ADMINISTRATIVE CONFERENCE ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-SECOND CONGRESS

SECOND SESSION

ON

S. 3671

A BILL TO AMEND THE ADMINISTRATIVE CONFERENCE ACT

JUNE 27, 1972

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ADMINISTRATIVE CONFERENCE ACT

TUESDAY, JUNE 27, 1972

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2:30 p.m. in room 4232, New Senate Office Building, Senator Edward M. Kennedy (chairman of the subcommittee) presiding.

Present: Senator Kennedy.

Also present: James F. Flug, chief counsel; and Thomas M. Susman, assistant counsel.

Senator KENNEDY. The subcommittee will come to order.

Over a year ago in his state of the Union address, President Nixon observed with unaccustomed candor that "Most Americans are simply fed up with government at all levels." Since that time, actions on the part of officers and agencies of this administration have done little to instill public confidence in the integrity and responsibility of governmental processes. If anything, the average citizen is feeling increasingly powerless to influence the course of Government activities affecting him.

After numerous secret meetings between company representatives and Government officials, the Justice Department last year settled three major antitrust cases against I.T. & T. without any public indication of the reasons for the settlement or disclosure of the contacts leading up to the settlement.

The SEC recently dismissed with a meaningless consent order its suit against I.T. & T. and company officials without any public disclosure of the facts and records on which it based its originally weak complaint.

The Federal Communications Commission, charged with regulating the airwaves, was revealed to have worked overtime in monitoring telephone calls of its own employees.

A growing White House staff has assumed direction and control over many aspects of agency decisionmaking but, cloaked in the mantle of executive privilege, has refused to testify before Congress about involvement with or influence over Federal programs.

Government agencies have refused to provide Congress with information without even invoking executive privilege, in direct contradiction of a Presidential mandate.

The Defense Department has unjustifiably covered its activities with the stamp of "Security Confidential", leaking information beneficial

to it but urging strict prosecution of anyone accused of bringing adverse information to public attention.

We meet this afternoon to consider legislation relating to the Administrative Conference of the United States. I am not suggesting that the Administrative Conference should or could become involved in remedying the various administrative abuses described above. But the Conference is charged by statute to:

> Develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest.

There is little question that these abuses reflect a failure on the part of Government to develop practices and policies fully responsive to public interests and needs, including the public's interest in what its officials do and write in carrying out their responsibilities. It is to these procedural failures that the Administrative Conference addresses itself.

Delay, inefficiency, misplaced priorities, secrecy, expensiveness, and unresponsiveness are just a few of the problems incurred in the course of agency activities. Government agencies exercise powers of enormous significance to private citizens without providing even the minimal safeguards of notice, opportunity for hearing, and public statement of reasons in support of a decision. The Administrative Conference is the only Federal Agency that is specifically charged and equipped to study and recommend needed changes in the administrative machinery necessary to improve the quality of administrative justice meted out by the Federal Establishment. Its successes will benefit all of us, its failures can result in the perpetuation of practices and procedures detrimental to all of us.

Certainly the present Administrative Conference is off to a good start. With its limited staff and resources it has already demonstrated that it can be a vital force in improving the administrative processes. Since its establishment in 1968 it has adopted 31 formal recommendations, many of which have been implemented in full or in part. In some cases agencies have adopted Conference recommendations even before they had been fully developed. Numerous bills reflecting specific Conference recommendations have been introduced before Congress. One of those bills—embodying three Administrative Conference recommendations relating to sovereign immunity, the amount in controversy requirement in Federal question cases, and the naming of the United States as a party defendant—has been reported favorably by this subcommittee and is presently awaiting full Judiciary Committee action.

There is a great need for dispassionate, scholarly, and detailed studies which are beyond the present means of the Administrative Conference. The Conference could also effectively utilize services and grants which it cannot now legally accept. The legislation before us today would meet these problems.

Improvement of administrative procedures and increased understanding of official behavior will lead to greater citizen confidence in the integrity and legitimacy of government action. Exploration of the administrative process by the Administrative Conference on a larger and deeper scale should make a substantial contribution to those ends. Its demonstrated capabilities to conduct impartial, professional

studies and to propose sound remedial measures have convinced me that the Conference should now be given the opportunity to expand its activities.

The popular dissatisfaction with the workings of government at all levels will not be dispelled by simply stripping the government of all its powers. The solution lies in constant reexamination, reevaluation, and reform, so that the government can stay attuned to and become more responsive to the needs of the people. It is this process of reexamination, reevaluation, and reform that is the objective of the Administrative Conference. Congress must do what it can to provide the Conference with the tolls for meeting that objective.

We will proceed with our witnesses this afternoon. They are all well known around government circles. Roger Cramton was named to head the Administrative Conference in the fall of 1970. He came to the Conference from the University of Michigan, where he had been a professor in the law school. Before we has appointed Chairman, Mr. Cramton served as a consultant to the Administrative Conference, and in that capacity he appeared before this subcommittee to testify on legislation reflecting three Conference recommendations.

Accompanying the Chairman is Mr. Warner W. Gardner, senior partner in a Washington, D.C., law firm. Mr. Gardner served as Assistant Secretary in the Interior Department and was a Solicitor in both that Department and in the Department of Labor. He now chairs the Committee on Informal Action of the Administrative Conference.

I would also like to welcome Mr. John Cushman, who is the Executive Director of the Conference. We shall proceed in whatever manner you wish.

STATEMENT OF ROGER C. CRAMTON, CHAIRMAN OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ACCOMPANIED BY JOHN F. CUSHMAN, EXECUTIVE DIRECTOR

Mr. CRAMTON. Mr. Chairman, I am delighted to have this opportunity to testify in support of S. 3671. You have before you the lengthy prepared statement which has been submitted on behalf of the Administrative Conference and in support of the legislation. I would ask that the statement be put in the record, I will not read it, but merely summarize a few of its highlights to save time for questioning.

Senator KENNEDY. The statement will be printed in its entirety.

Mr. CRAMTON. The objectives of the proposed legislation are, first, to provide the Administrative Conference with authority to seek appropriations in excess of the present statutory ceiling of $450,000 per annum, and, second, to clarify its contractual authority and to grant the authority to receive funds and voluntary services from State, Federal, and private agencies and instrumentalities.

Because the committee is familiar with the past history of the Conference, its statutory mandate, general structure, mode of operation, and the like, I will not deal with these matters in detail; but I am prepared to answer questions concerning them. My prepared statement contains a fairly complete discussion of the past achievements and current activities of the Conference. Today I would like to illustrate some of the highlights of its activities and of the legislative proposal.

The Conference has now promulgated 35 recommendations. A large portion of these recommendations have been adopted in whole or in part by Federal administrative agencies. We have had a better record with those recommendations addressed to particular agencies and with those addressed to agencies in general as distinct from those for legislation—the legislative process being somewhat slower and more difficult. An appendix to my statement lists the 35 recommendations and provides a current evaluation of their present status of implementation.

One of these recommendations illustrating the relationship of the Conference's past work and its continuing activities involves a subject of great concern to this subcommittee over the years, the Freedom of Information Act. I participated recently in month long hearings on agency compliance with the Freedom of Information Act held by the House Committee on Government Operations. Prior to that, the Conference had laid the groundwork in this area through a very careful study of Professor Giannella of Villanova Law School and a recommendation setting down guidelines for the implementation of the act. I had the pleasure of telling the House subcommittee of the steps that some Federal agencies have taken in response to that recommendation and urging the subcommittee, as I urge this subcommittee, to join us in efforts to get Federal agencies to go down the road even further in complying with the spirit as well as the letter of the Freedom of Information Act.

The efforts of the Conference in implementing its recommendations, I might add, are greatly assisted by the attention given to the same matters by congressional interest in and oversight of matters on which the Conference has taken a position.

A second category of recommendations deals with the important question of public participation in the administrative process. I do not have to tell the chairman of the lack of citizen confidence in government today, the feeling of helplessness and inability on the part of many citizens to influence decisions that have important effects on them, and the correlative importance, therefore, of greater citizen input and involvement in the administrative process. The Administrative Conference has been involved in this with two recommendations—recommendation 5 which recommended the creation of a poor peoples' counsel; and recommendation 28 which deals broadly with public participation in the Administrative Conference. Our efforts to foster legislation for a peoples' counsel have not been greeted with overwhelming success, but the efforts toward broader right of access to the administrative process, toward lowering the cost of participation, and so on, are making a great deal of headway.

A similar concern is now involved in the consumer advocacy legislation which is now pending in both Houses of Congress. It is another attempt toward the same objective of greater citizen participation in the administrative process. I might add that the current committee print of S. 1177, which is the consumer advocacy legislation now under consideration by Senator Ribicoff's subcommittee of the Senate Committee on Government Operations, would fully implement recommendation 28 of the Administrative Conference of the United States, particularly those parts dealing with right of access, low transcript costs, and reduced costs of participation in the Federal administrative process.

I could talk in great detail about a number of other past activities and recommendations of the Conference. Mr. Gardner in his presentation will deal with several that are highly important. I would like to turn now, though, to a few remarks about the emerging role of the Administrative Conference in the Federal scheme of things.

One function it was anticipated the Conference would perform is that of commenting on general questions of administrative procedure. We have engaged in that activity not only in the form of recommendations, but also on a continuing and informal basis. During the next few years, we plan to give an extensive review to the Administrative Procedure Act, which has now been in effect for more than a quarter of a century and is in need of reexamination from top to bottom.

A second area in which the Administrative Conference has made a useful contribution in the past, and hopes to do more in the future, deals with the informal administrative process. I will leave that to my colleague and committee chairman, Mr. Warner Gardner, whose committee has been laboring in that field.

There are several kinds of frontier questions of administrative law in which the work of the Administrative Conference is more and more involved. On the one hand, there is the need to improve decisionmaking on the complex social, scientific, economic issues which a complex society increasingly creates. Let me give as an example the handling of environmental and safety issues in atomic reactor licensing. Here there is a need for citizen participation, a need for accurate, quick determinations of highly complex matters, a need to explore alternatives, and a need to identify and articulate competing values and intelligently choosing among them.

The Administrative Conference has a number of studies underway dealing with the handling of environmental and safety issues in these highly technological and complex areas in which social and technological change is throwing up new problems.

A similar area has to do with what I sometimes refer to as "mass justice in the welfare state." Increasingly, as individuals become dependent upon the distribution of Government largesse, whether it takes the form of housing, welfare benefits, government employment, or what not, determinations of a highly individualized character as to whether particular individuals are eligible for and entitled to these benefits are of increasing importance. The procedures that surround distribution of such benefits are of great social concern. The Administrative Conference is now embarking on a number of studies which will attempt to illuminate the procedures for decisionmaking in these areas—decisions which affect millions of Americans in terms of the availability of benefits. One study deserving special mention is concerned with the administration of disability benefit programs by six Federal agencies. There are six programs which are very different in their procedural framework. Altogether, they distribute to Americans some $8 billion of benefits each year. Some of the programs are subject to the Administrative Procedure Act, some not; some are totally foreclosed from judicial review, others not; some have many layers of administrative hearing and rehearing of a particular claim, others are much more summary in nature. We want to identify the consequences of the procedural differences involved in these programs and to try to get at the realities of mass justice in the welfare state. What

procedures should government use to allocate benefits, procedures that will be fair, acceptable to the persons involved, reach accurate results, but which do not require too much in the way of governmental resources?

Carrying on the scope of activities indicated by the studies that I have briefly mentioned and many others—some 30 to 35 on-going projects—within the framework of a budget at or near the appropriation ceiling of $450,000 has turned out to be a difficult matter. Some of the studies we would like to undertake and other functions we would like to do more on, such as working with congressional committees that are considering the administrative procedure aspects of new legislative programs, can't be adequately pursued unless outside help is forthcoming or the resources of the Conference are substantially increased. It is for this reason that the Conference, with the full support of the administration, has sought congressional approval of a legislative proposal to eliminate or raise the $450,000 ceiling on appropriations.

It is our feeling that an appropriations ceiling for a permanent agency is awkward and unnecessary. The ordinary budgetary and appropriations process provides adequate executive and legislative review of our programs. It is noteworthy that the Conference, so far as we know, is the only permanent Agency of the Federal Government to have an appropriations ceiling in its basic statute. The oversight function which this committee can and should perform can be carried on wholly without regard to an appropriations ceiling.

The appropriations ceiling limits the Conference in a number of ways. First, if the ceiling is too low, as it is now, it places an arbitrary restriction on Conference activities which not only can be undertaken but which we can seek funding from Congress to try to undertake.

The ceiling also works a hardship because we are caught at moments of time like the present with inflationary pressures and other uncontrollable forces which continue to increase our costs, but are unable to obtain funding required even to carry on our existing program, to say nothing of an expanded program.

In my prepared statement, a 5-year forecast of financial needs, possibly needed expenditures, and opportunities for modest expansion, are developed in some detail. I would like to mention several very briefly. First, we desperately need the opportunity for additional funding to handle inflation and normal growth. Second, we need to disseminate our reports and print them much more quickly and practically and get them out so they will not just be studies that are accumulating on the shelves.

Third, as the Conference has grown, we need a slightly larger personnel to handle the administrative details of an organization that now involves approximately 150 people as members, consultants, and staff members.

I would like to emphasize that the Conference will never be a large bureaucratic organization. It should always be small and flexible, highly professional in character, composed of high quality staff members and consultants. But it does need to grow modestly to undertake the programs needed to bring a new perspective or broader perspective to the Federal administrative process, to illuminate the dark corners of the administrative process which no one else is looking at.

To do that, we need some additional funds to undertake further research. The Conference at present has only about $100,000 per year to devote to research by outside scholars. The needs are far greater than this limited funding will support. In the proposed forecast of expansion, we outline some areas of needed research activity.

Finally, I would like to mention that the proposed legislation contains a number of technical amendments to the Administrative Conference Act which will improve its functioning and allow it on occasion to supplement its appropriation with research funds obtained from private nonprofit institutions. Provisions of this type are customary with agencies and bodies which have only advisory functions and it is believed that their omission from the Administrative Conference Act was an unintended oversight.

I would like to conclude here and to turn the platform over to my distinguished colleague and coworker, Warner Gardner.

(The complete statement of Mr. Cramton follows:)

Mr. Chairman and Members of the Subcommittee: I deeply appreciate the opportunity to appear today and to testify in support of the legislation which is before you to amend the Administrative Conference Act. It also provides an initial and welcome opportunity for me to discuss with the Subcommittee my views as to the emerging role of the Conference.

The legislation before you, S. 3671, introduced by Senator Kennedy for himself and Senators Hruska, Cook, Hart, Mathias, and Ribicoff, was prepared by the Administrative Conference, approved by the Assembly of the Conference at its Plenary Session last December, and has the full support of the Administration. It has received the strong support of Government officials who are active in the Administrative Conference and has been officially endorsed by the American Bar Association.

The proposed legislation has two major objectives: (1) to provide the Conference with authority to seek appropriations in excess of the present statutory ceiling of $450,000; and (2) to clarify its contractual authority and authorize the acceptance of gifts, bequests and voluntary services of State, Federal, and private agencies or instrumentalities. I plan to devote major attention to the question of adequate funding for the Conference, since the amendments in Section 1 largely relate to housekeeping and administrative authority.

I. BACKGROUND

The Administrative Conference of the United States was established in 1964 pursuant to the Administrative Conference Act, 5 U.S.C. §§ 571–576, and was activated in January 1968 with the appointment of its first chairman. As this Subcommittee will recall, it was the outgrowth of two very successful temporary Administrative Conferences, one established by President Eisenhower in 1952, the other by President Kennedy in 1961.

From the outset it was recognized that the new agency would occupy a unique place in the governmental structure of the United States. First, it is unique in its mission which, in effect, is to monitor all aspects of the administrative process in all of the executive and independent agencies; to identify and analyze the causes of administrative inefficiency, delay and unfairness; and to recommend specific means of improving the quality of administrative justice as it affects millions of Americans in their daily lives. It is, thus, not an agency with an ongoing operating program of fixed dimensions.

Second, the Administrative Conference is unique in its composition. Leadership is provided by a full-time Chairman who is appointed by the President with Senate confirmation for a five-year term and by a ten-man Council appointed by the President for staggered three-year terms and drawn in part from Federal agencies and in part from private life. In addition, its membership includes 42 high-level representatives designated by 35 major departments and agencies of the Federal Government and 35 distinguished private citizens who are specially knowledgeable on administrative procedure. While the Government members have a small numerical predominance, the Conference enjoys the benefit

of the broad expertise of private practitioners, academics, state officials and others who act as strong leavening agents.

Third, the method of operation of the Conference is unique. The Assembly consists of 87 members, exclusive of the Chairman, who furnish their time and talents in addition to their regular full-time Government or private endeavors. It conducts its business much like a legislative body, except that it enacts recommendations, not laws. It works through Committees and is supported by a small, highly qualified staff in the Office of the Chairman and by approximately 35 part-time consultants, mostly drawn from law schools, who provide the expertise for the in-depth studies which form the basis of Conference recommendations.

Finally, the Administrative Conference is unique among advisory bodies in its permanence. Most commissions and advisory groups are established for the sole purpose of studying specific problems and cease to exist after they report their findings and conclusions to the President and Congress. The Administrative Conference, however, not only makes findings but as a permanent agency has the opportunity to seek implementation of its recommendations. A rapidly growing responsibility of the Chairman's office is to work with the agencies to place in effect changes that will strengthen the Federal administrative process or to seek necessary legislation from the Congress.

We thus have a full-time, permanent independent agency whose sole responsibility is to seek to improve the machinery of government. Since its authority is only to make recommendations, it draws its strength from the high calibre of its membership, the quality of its research, and the persuasive force of its recommendations. It is a novel experiment which in the relatively short span of 4 years has achieved widespread support for its activities and accomplishments.[1]

II. BRIEF SUMMARY OF CONFERENCE ACTIVITIES

A. Format recommendations

During its first four years, the Conference has held seven Plenary Sessions and adopted 35 formal recommendations.

The level of Conference activities now requires two regular plenary sessions each year, one in June and the other in December.

Conference recommendations adopted to date deal with such matters as:

Compliance with the Freedom of Information Act [No. 24].

Improving Government publications and public information about Government activities [Nos. 2, 3, 4, 11, 12].

Streamlining judicial review of agency decisions [Nos. 7, 9, and 18].

Elimination of duplicative and unnecessary procedures [No. 13].

Minimum procedural safeguards for Federal grant-in-aid programs and enforcement of conditions included in such grants [Nos. 26 and 31].

Strengthening the role of hearing examiners [Nos. 6 and 17].

Broadened public participation in rulemaking and other administrative proceedings, including greater representation of the poor [Nos. 5, 16 and 28].

Requiring agencies to articulate their policies in general rules [No. 25].

Expediting trial-type proceedings through such devices as the use of summary procedures, broadened discovery and reduction of interlocutory appeals [Nos. 20, 21 and 23].

In addition to these general topics, a number of important reports and recommendations are devoted to the handling by particular agencies of one or more functions. Recent examples are:

Exercise of discretion in change-of-status cases by the Immigration and Naturalization Service [No. 27].

Procedures of the Food and Drug Administration for the formulation of food and drug standards [No. 29].

Availability to the public of "no-action" letters issued by the Securities and Exchange Commission [No. 19].

Practices and procedures of the Renegotiation Board [No. 22].

Many of these recommendations have been implemented in full or in substantial part and others are in the process of implementation. Of the twenty-two

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[1] Appendix A includes excerpts from a number of recent letters commenting favorably on the work of the Conference. It also includes a resolution in support of the proposed legislation adopted by the Section of Administrative Law on behalf of the American Bar Association.

recommendations which are a year or more old, three have been fully implemented and 13 have been adopted in whole or in part by one or more agencies. Of the twelve recommendations involving legislation, bills have been introduced as to seven and hearings held on five. There has also been substantial progress towards implementation of a number of the recommendations adopted since June 1971. Appendix B lists the 35 recommendations adopted to date with a brief evaluation as to the status of implementation.

At the Seventh plenary Session, held on June 8–9, 1972, the Conference adopted recommendations on the following subjects:

Broadcast of Agency Proceedings [No. 32].

Conflict-of-Interest Problems in Dealing with Natural Resources of Indian Tribes [No. 33].

Procedures of the United Board of Parole [No. 34].

Negotiation and Suspension of Rate Proposals by Federal Regulatory Agencies [No. 35].

B. Current studies

Committees of the Conference with the assistance of the staff of the Chairman's Office and academic consultants or contractors are engaged in a wide variety of studies at the present time. A list of some of the studies now nearing completion includes the following subjects:

Procedures for expediting complex and protracted administrative cases.

The handling of disability benefit claims by the Social Security Administration and by other Federal agencies which administer disability programs.

Prosecutorial discretion in the enforcement of violations of Federal regulatory statutes.

Money penalties as an administrative sanction.

Procedures of the Atomic Energy Commission for licensing nuclear reactors.

Pre-induction judicial review of Selective Service System determinations.

"Adverse action" procedures for the discipline or removal of Federal employees.

Remedies of the resolution of property disputes between the United States and private persons.

The administration and coverage of the Federal Tort Claims Act.

Proposed amendments to the Administrative Procedure Act.

The handling of citizen complains by Federal agencies.

Procedures of the U.S. Forest Service.

Several of these subjects are discussed in more detail below in connection with the need for funding of special studies.

C. Other Conference activities

In addition to studies which look to formal recommendations, the Conference engages in a number of related but equally important activities. Last year, for example, detailed comments were transmitted to the President concerning the Ash Council's "Report on Selected Independent Regulatory Agencies." The Conference advised the President that it was not persuaded that a case had been made for the fundamental changes in the structure of six independent agencies proposed in the Report, and the recommendations of the Ash Council have not been implemented.

At the request of the Joint Committee on Atomic Energy and with the support of the Atomic Energy Commission, which has detailed a person to our staff, the Conference has undertaken a substantial study, now nearing completion, of procedural problems in the licensing and regulation of nuclear power plants. In addition, views and comments have been provided to Congress on many legislative proposals, including bills to establish a Consumer Protection Agency, to revise land management policies, to establish an ombudsman in the Federal system, and many others, as well as on the Conference's own legislative proposals stemming from recommendations. The Conference has also assisted Congressional committees in the review of the administration and effects of general statutes, such as the Freedom of Information Act and the National Environmental Policy Act. These general advisory functions of the Conference are becoming increasingly more important and time consuming.

A number of new agencies have called upon the Conference for assistance in establishing their administrative procedures, including the Postal Rate Com-

mission, the Council on Environmental Quality, the Environmental Protection Agency, and the Occupational Safety and Health Review Commission. Older Federal agencies also request assistance from the Conference on general questions of administrative procedure. Recently, for example, a detailed report on the question of a title change for Federal hearing examiners was submitted to the U.S. Civil Service Commission at its request. And there is a growing demand for house counsel services in aid of drafting legislation or consulting on the validity of proposed rulemakings or other activities.

The brief description of the background and activities of the Administrative Conference demonstrates, I believe, that the Conference is an active and innovative agency which is making substantial contributions to better government. Federal agencies, like other large organizations, tend to become absorbed in their own special mission and special constituency. The Administrative Conference is one of the few mechanisms that assists agencies in taking a broader view of the procedures by which they affect private rights and interests.

III. THE APPROPRIATION CEILING

A. Prior history

As introduced and as approved by the Senate, the legislation which became the Administrative Conference Act in 1964 contained no ceiling on appropriations (S. 1664, 88th Cong., 1st Sess.). At the hearings before Subcommittee No. 3 of the House Judiciary Committee, however, concern was expressed because there was no indication as to the numerical size and annual cost of the Conference. Based on the operations and costs of the 1962 temporary Conference, the Subcommittee was advised that the size of the agency should range from 75 to 91 members and that costs would be approximately $250,000 per year on the basis of 1962 prices. These limitations were included in the House version of the legislation, and were incorporated in the bill as enacted. [P.L. 88–499].

By the time the Conference was activated in 1968, the $250,000 ceiling was already so restrictive as to prevent the Conference from carrying out in a meaningful way the important studies and programs that Congress envisioned in creating the agency. Accordingly, legislation was introduced in 1969 for the purpose of removing the ceiling. During the debates on this legislation the question was raised as to the actual needs of the Conference. Since the agency had just barely commenced operating there was no experience to turn to other than the costs of the 1962 Conference. This Subcommittee was advised that it would require about $400,000 to provide the same level of support as that of the 1962 temporary Conference. In the course of the testimony the following exchange occurred:

"Senator THURMOND. I notice you say that you are operating with a total permanent staff of seven; three are lawyers, the rest are secretaries and a messenger. You desperately need at least one more lawyer and one more secretary. If you get $450,000 that would take care of that situation.

"Mr. WILLIAMS. Yes, it would. I would state quite clearly that we would not expect under any current conceivable circumstances, if we are not assigned additional duties by the Congress from some other source, we would not ask for more than $450,000 in the next year or two. I think that is quite clear.

"Senator THURMOND. Well, I was wondering if it wouldn't be better from your standpoint and that of the agency if you just asked for the $450,000 this year and fight for that and maybe not contend to leave the amount open without any limitation. You can come back some other year if you felt you needed more?

"Mr. WILLIAMS. The difficulty with that, Senator Thurmond, is then our appropriation becomes a two-step process. If something comes up and we do need more funds, we must first get the statute amended to raise the ceiling before we can ask for the funds. That is exactly the squeeze we have been in this past year. We have not been adequately funded, but we could not become adequately funded because we had the ceiling." [2]

As you will recall, the ceiling was increased to $450,000 [P.L. 91–164]. Since then the Conference has operated on a budget of $378,000 in FY 1971, $408,000 for FY 1972, and has been granted $450,000 for FY 1973. Thus, as a practical matter, the Conference has operated at or below the level of funding of the 1962 Temporary Conference.

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[2] Hearings on S. 1144, Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, United States Senate, 91st Congress, 1st Session, May 26, 1969.

B. Removal of the appropriation ceiling

We believe that an appropriation ceiling for a permanent agency like the Administrative Conference is awkward and unnecessary and that the ordinary budgetary and appropriations process provides adequate executive and legislative review of our programs. The Conference, insofar as we have been able to determine, is the only permanent agency of the Federal Government to have an appropriation ceiling in its enabling legislation.

While there may have been some justification for such a provision during the uncertain period of activation and initial development, the Conference is now fully operational with fixed overhead and predictable appropriation requirements. Accordingly, the usual statutory language authorizing the Conference to seek such funds as it may justify as necessary to carry out its functions should be substituted for the existing appropriation ceiling.

We recognize the special interest of this Committee in the work of the Conference and its desire to be kept informed with respect to its general activities. That oversight function, however, is clearly separable from the budgetary process. The Subcommittee has full and continuous authority to conduct oversight hearings with respect to an agency within its purview. We would welcome the opportunity to appear before this Committee at regular intervals to discuss our work if the ceiling on appropriations were to be removed.

The Conference suffers in a number of ways from having to operate under a fixed ceiling. First, if the ceiling is too low, it places an arbitrary restriction on Conference activities without any regard to the merits or importance of what the Conference proposes to do. For example, we began a study of the disability benefit program administered by the Social Security Administration. In the course of the project we became convinced of the need for a broad study of the administrative procedures of all six Federal disability benefit programs. Our estimate of the cost for a thorough research job was upwards of $100,000. Obviously a study of this magnitude would be impossible if the Conference had to underwrite it. Our total resources this year for research are less than $100,000, an amount that produces an amazingly large product but drastically limits the scope of projects that can be undertaken. Fortunately, the Social Security Administration of the Department of Health, Education, and Welfare was persuaded of the importance of the study and has agreed to provide substantial support through an interagency transfer to the Conference of $50,000 ($10,000 in FY 1972; $40,000 in FY 1973). But in the absence of this funding, the study could not have gone forward without first persuading the Judiciary Committees and the Congress to amend the Administrative Conference Act to authorize it to receive more funds, and then by repeating the process through the Appropriations Committees and the Congress to appropriate the needed funds. This process, we have learned from experience, takes the better part of two years.

The ceiling also works a hardship because inflationary forces and other uncontrollable factors continue to force upward the costs of salaries, travel and fixed overhead. In connection with the 1969 ceiling legislation we documented that the $250,000 level of operation provided for by the 1964 legislation would cost at least $400,000 in 1969. Because of continuing pay and other cost increases, the budget of $450,000 for FY 1973 will merely permit the Conference to continue to operate at the existing level of activity. Increases in staff, salaries, consultant fees and housekeeping expenses have already required some projected downward adjustments in FY 1973 operations—even before the budget was approved. Thus the present ceiling of $450,000 is beginning to work severe hardship at the very time when there is a strong need for expansion of the Conference's activities.

It is no longer pertinent to inquire how much money would be needed to fund a Conference like that of 1962. Current and prospective needs should be evaluated in the light of the Conference's past accomplishments and the opportunities for future service. Such an evaluation, I believe, will lead to the conclusion that the Conference should no longer be required to operate under a ceiling on funds. It should justify its appropriations each year to OMB and to Congress in accordance with the generally accepted practices applied to all other permanent agencies of the Federal Government. At a minimum, such an evaluation leads to the conclusion that, if a ceiling is retained, the amount of that ceiling should be substantially increased.

IV. FORECAST OF NEEDED ACTIVITIES AND THEIR FUNDING REQUIREMENTS

While elimination of the appropriation ceiling is sought at this time, any action with respect to the ceiling necessarily involves an examination of the financial

needs of the Conference during the period immediately ahead. For the purposes of this statement, a five-year forecast of projected activities and financial needs has been used. These needs fall into two categories: (1) funding of existing program needs to fulfill minimum statutory mandates; and (2) meeting opportunities for larger service with a program of modest and gradual expansion. To some extent these categories overlap, and in any event it is not always possible to segregate funding along these arbitrary lines.

A. Existing program needs to fulfill statutory mandates

1. Normal growth

One way of expressing the financial requirements of the Administrative Conference is in terms of increases in costs due to such uncontrollable items as pay increases and expenses to cover higher costs of operations due to inflation and normal growth. These normal growth costs are sometimes estimated at 6 percent compounded annually but, more realistically, should be computed at 10 percent. If the future appropriations for the Administrative Conference were designed solely to meet just these increases, its budget requirements over the next five years would be as follows:

Year:	*6 percent per annum*	*10 percent per annum*
Present	$450,000	$450,000
1	477,000	495,000
2	506,000	544,500
3	536,000	599,000
4	568,000	659,000
5	602,000	725,000

2. Publication of reports and activities

The Conference is currently authorized a permanent full-time staff of 12 people, including the Chairman. We also employ approximately 35-part-time consultants. But it has become increasingly difficult to meet the minimal needs of the Conference for supporting services with a staff of only 12 persons. In fact, we are sorely short-changing a number of highly important functions which are called for in our statutory mandate.

A major part of the work product of the Conference takes the form of scholarly reports and recommendations. This work product must be reproduced and given wide distribution if it is to be fully effective. Yet because of lack of funds, research reports of great value and high public interest are now photocopied, stapled and mailed out only on demand. They are printed for broad circulation only as they may be subsequently published in learned journals of limited circulation (usually law reviews) or are thereafter reprinted in a series of bound reports which the Conference publishes as a means of preserving them for the public record. Only one such volume has been published to date although a second will appear later this year. Timely and attractive publication and wide dissemination of Conference reports would multiply the benefits of the Conference's work and result in greater likelihood that its recommendations would be implemented.

In addition, the job of editing the publications of the Conference and of reporting on its activities in the form of a quarterly newsletter largely falls into the hands of the senior professional staff, who sometimes must pitch in to help duplicate, staple and mail as well as to prepare the copy and edit the reports. The result is that the work of the Conference loses some of its utility simply because we are unable to package the work product in an attractive form and give it proper and timely distribution. Moreover, the time and energy of senior staff is dissipated on activities that can and should be performed by employees of lower grade.

The staff of the Conference should immediately be increased by at least three people, a skilled editor-public information officer (GS–13), a secretary-librarian (GS–7) and a mail clerk-duplicating machine operator (GS–5), at an annual cost of approximately $35,000. Printing and distribution costs would add another $25,000 annually for a total of approximately $60,000 per year.

3. Administrative support services

The shortage of support services is also evident in the area of fiscal and program administration. Contracts and other financial arrangements with about 35

academic consultants, arrangements for committee and Conference meetings, travel and other financial reimbursement for the nearly 150 persons involved in the Conference (members, consultants, and staff) consume a large and increasing amount of time. These services have been provided by diverting the time of the Executive Director (GS–18) and a highly trained secretary (GS–10) into a mass of administrative details that could be handled by an administrative officer assisted by a secretary with a bookkeeping capability. This would free the Executive Director for badly needed work on implementation of Conference recommendations, liaison with other Government and private organizations, and general supervision of personnel. The addition of an Administrative Office (GS–12) and a secretary-bookkeeper (GS–9) would involve an annual cost of about $25,000.

4. Visiting scholars

The research capability of the Chairman's office would be substantially enhanced if its staff included at all times two highly qualified visiting scholars. They would normally be persons on leave of absence from a major university who would each serve approximately a year. One would normally be a law professor; the other from the social sciences. Scholars to fill these positions would be sought out for their special expertise and would be expected to produce detailed studies and recommendations in their special field of competence.

The experience of the Conference in recruiting the very best academics for its activities provides assurance that persons of unusual ability would be available on this basis. This arrangement would provide the Conference with specialized expertise without the necessity of enlarging its permanent professional staff. It would permit the Conference to undertake much more substantial research than that now feasible on the part of academic consultants who have full-time teaching responsibilities. This approach has been employed with marked success by a number of Government agencies such as the Antitrust Division of the Department of Justice and the U.S. Civil Rights Commission. It is estimated that such a program would cost approximately $75,000 per year (two professionals at $30,000 per year each plus secretarial and other support services in the amount of $15,000).

5. Statistical evaluation of administrative delay and performance

One of the stated statutory purposes of the Administrative Conference is to "collect information and statistics from administrative agencies and publish such reports as it considers useful for evaluating and improving administrative procedure." The temporary 1962 Conference undertook a statistical study which was updated as an early Conference project in 1968. Information on over half a million administrative cases which involved the preparation of a verbatim transcript was collected from 34 Federal agencies during the six-year period, 1961–1966. The project suffered, however, from a number of deficiencies—lack of uniformity in reporting, omissions, and especially the inability to analyze and evaluate the resulting data—and the Conference moved away from collecting statistics itself to a program of urging agencies to maintain statistics for their internal use (See Recommendation 14).

Today more than ever there is need for a reliable reporting system to collect, analyze and compare basic statistical information on agency proceedings. The social concern with administrative delay cannot be met until this is done. We do not now propose anything as elaborate as the statistical operation performed for the Federal Courts by the Administrative Office of the U.S. Courts, which requires annual funding for this purpose alone of about $1.5 million. But the information gathered should be sufficient to permit an evaluation of the hearing process, including the normal time of processing proceedings as well as the costs to public and private participants. It should be sufficiently detailed to permit some judgment about the wisdom of the procedures used and whether some other techniques might usefully be employed.

It is estimated that a meaningful pilot project using modern computer techniques and employing three or four persons, including a highly qualified statistician, would cost a minimum of $100,000 a year. The effort would be started on a small scale and expanded only as its utility was demonstrated.

B. Unfulfilled opportunities for service and their fiscal implications

The projects described above are believed to be in the category of essential services designed to meet minimal objectives. But the Conference is in the posi-

tion to play a much more important and useful role if the Federal Government takes full advantage of its talents and potential.

We need not inform this Committee that the institutions of government are today under attack, but none more so than Federal administrative agencies. Improvement of administrative procedures and increased understanding of official behavior are likely to lead to greater citizen confidence in the integrity and legitimacy of governmental action. Exploration of the administrative process by the Administrative Conference on a larger and deeper scale will make a substantial contribution to those ends.

Current problems in administrative process that require attention and study are legion. Mentioned below are several studies already initiated by the Conference which will require a far greater commitment of funds than are presently available if they are to be properly concluded.

1. Review of the Administrative Procedure Act

The Administrative Procedure Act of 1946 has been in effect for over a quarter of a century. Except for the Freedom of Information Act of 1966 (which amended Section 3 of the APA), it has remained unchanged during this period and has proved a flexible instrument that is well adapted to the variety and change that characterize the administrative process.

The provisions of the APA, however, are in need of thorough reconsideration in the light of present-day needs. Many functions are totally exempt from its provisions and the details of some of its requirements have been questioned. The American Bar Association is in the process of developing twelve specific amendments for Congressional consideration. One important ABA proposal would substantially increase the responsibilities of the Administrative Conference by empowering it to prepare uniform rules of practice which would be binding on Federal agencies.

The Administrative Conference plans to study these proposals as well as make its own independent evaluation of needed changes in the law. A major reconsideration of the Administrative Procedure Act is now timely. It could well occupy the full time of a senior professional and several consultants. The cost of this project is estimated at a minimum $50,000 annually for each of the next three years.

2. The quality of justice in the informal administrative process

The Administrative Conference is devoting a substantial portion of its resources to the illumination of the less visible parts of the administrative process—discretionary programs of the most far-reaching kind that are not covered by formal administrative procedures. Some examples are the Conference studies and recommendations with respect to the exercise of discretion by the Immigration and Naturalization Service and the Procedures of the Federal Parole Board (see Recommendations 27, 34); and current studies of the effectiveness of administrative sanctions, prosecutorial discretion, availability of advice from Federal agencies, and of other informal or discretionary functions.

The Committee on Informal Action has recently published a document entitled "Guidelines for the Study of Informal Actions by Federal Agencies," 24 Admin. L. Rev. (Spring 1972). Building on this work, the Committee is planning to undertake a broad study of a substantial number of discretionary functions in an effort to determine whether it is possible to develop general statutory criteria to govern the exercise of discretion. Imposition of even modest procedural requirements will remove much of the unexplained and possibly irrational decision-making which is encouraged by the present absence in many informal functions of even the most rudimentary procedural requirements.

It has been estimated that this project would take approximately three years, would require the services of a full-time professional, four senior consultants, and a number of young law clerks or research assistants, and would cost approximately $100,000 annually for a total of $300,000. The project may result in a legislative proposal—an Informal Administrative Procedure Act—which will be as important a landmark for our time as the Administrative Procedure Act was for formal administrative proceedings a generation ago.

3. Handling of citizen grievances and complaints

The greatly increased role of the Government has multiplied the relationships between Federal agencies and private individuals while at the same time the

increased size and remoteness of Government has made the whole process much more impersonal. Current slogans such as "citizen participation" and "participatory democracy" signify that citizens are demanding to have their complaints about Government heard and acted upon.

While it has been suggested in some quarters that the Administrative Conference undertake an ombudsman function by handling citizens' complaints either directly or by reference from Members of Congress, the Conference has neither the staff, resources or present willingness to embark on such an enormous task. But the Conference can make a beginning with respect to our understanding of the dimensions of the problem and of possible mechanisms for solving it by undertaking a broad study of existing agency complaint-handling procedures. Much thinking has been devoted to this subject and two pilot studies are underway. Much more now needs to be done.

The Conference now hopes to begin research to develop broad information which should illuminate the dimensions and character of the problem, the adequacy of existing complaint-handling institutions, the advantages and disadvantages of proposed institutions, and the possible use of systematic study of complaint patterns as a method of identifying trouble spots in the administrative process that need further attention. A study as outlined above should be funded over a 3-year period at approximately $100,000 per year. Costs are relatively higher in this area because systematic techniques of data collection, measurement and analysis, and the services of experienced social scientists as well as lawyers and administrators, must be employed.

The three specific projects described on the preceding pages are merely illustrative of the type of larger-scale projects which the Administrative Conference believes that it can and should perform. Projects of this dimension are totally beyond the present resources of the Conference, although the high-level supervisory persons now employed by the Conference could provide effective supervision for a limited number of such projects, especially if the provision of additional supporting personnel relieved them of other activities which they are now required to perform.

Elimination or raising of the appropriation ceiling will not, of course, provide the funds for these or other specific projects of the Conference. Any increase in the Conference program will require the support of the Office of Management and Budget and the appropriation by Congress of the requested funds. The Conference will be required to jusity the proposed activities for which it asks funding.

Thus the question before the Committee is not the merits of the individual projects or the precise funding that they require. The question is whether the Administartive Conference should be given the opportunity to present a justification to the Executive branch and to Congress for some or all of these or similar activities. The present appropriations ceiling precludes even the most meritorious proposal from being advanced.

C. FIVE-YEAR ESTIMATE OF FUNDING REQUIREMENTS

The projected increases described above disclose that within a five-year period an annual budget for the Administrative Conference of $1,250,000 will be barely sufficient. This figure is derived as follows:

	Annual cost
1. Present level of funding	$450, 000
2. Increase in basic operating funds to provide for increases in costs with only a modest or no growth in program	275, 000
3. Funds required to fulfill statutory mandates under existing program:	
a. Publication of reports and activities	60, 000
b. Visiting scholars	75, 000
c. Administrative support activities	25, 000
d. Collection and analysis of statistics on administrative delay and performance	100, 000
4. Funding for three major projects at any given moment of time	250, 000
Total	$1, 235, 000

We urge the Congress to eliminate the appropriation ceiling from the Administrative Conference Act. If the Congress chooses to raise the ceiling rather

than remove it, we urge that the amount of the ceiling be set at not less than $1,250,000. This would more than double the present ceiling and permit requests for adequate funding during the next 5 years unless substantial new authority is vested in the Conference.

V. MISCELLANEOUS AMENDMENTS

Section 1 of the draft bill provides for a number of statutory changes designed to deal with problems which have arisen in the recent past or can be anticipated in the near future. They constitute, we believe, oversights or omissions in the original enactment and, since similar provisions are commonly included in statutes governing advisory bodies, they should not prove controversial.

Section 575(c)(10) of title 5, United States Code, would be revised to clarify the Conference's authority to contract for studies as well as to have them performed by consultants employed on a temporary or intermittent basis. While our authority to do so has been inferred from our general powers and has never been questioned, we believe that specific authority would be desirable because of the possibility of entering into larger research contracts in the future with individuals or non-profit institutions. In addition, the revised paragraph would authorize us to pay our consultants at a maximum daily rate equivalent to that of a GS–18. The present limitation of $100 on per diem consulting pay may become unduly restrictive as professional and governmental salaries rise.

The other proposed additions to section 575(c) would authorize the Conference to utilize with their consent the services and facilities of State, Federal, and private agencies and instrumentalities, and to accept gifts, bequests and voluntary and uncompensated services. These grants of authority are customary for agencies with research and advisory responsibilities and would, we believe, enable the Conference to participate with public agencies and private institutions in studies and other undertakings of mutual interest which might otherwise be beyond our financial capacities.

On the basis of exploratory conversations with several non-profit private foundations, it is apparent that there is substantial interest in Conference projects such as those described above. To the extent that research funds are obtained from non-Government sources, the Federal Government will receive the benefits without any burden being placed upon the Federal taxpayer. Cooperative arrangements with non-Government organizations will be facilitated and should also result in substantial savings of Federal funds. Great caution will be exercised, of course, in the selection of the sources of outside funding in order to avoid even the appearance of non-objectivity or partiality in Conference activities. Similarly, the Conference will not employ permanent staff on the basis of grants from outside sources, but will use such funds for contract research and support of project-related expenses such as travel, supplies, publication, and the like.

CONCLUSION

The Administrative Conference of the United States respectfully requests enactment of its proposed legislation to amend the Administrative Conference Act. The present appropriation ceiling should be removed entirely or, at a minimum, increased to $1,250,000, a figure which represents the potential scale of activities that is desirable over the next five-year period. The other proposed amendments will improve the functioning of the Conference and allow it on occasion to supplement its appropriation with research funds obtained from other sources.

Senator KENNEDY. Mr. Gardner?

STATEMENT OF WARNER W. GARDNER, MEMBER OF THE ADMINISTRATIVE CONFERENCE AND CHAIRMAN OF THE INFORMAL ACTION COMMITTEE

Mr. GARDNER. Mr. Chairman, Mr. Cramton thought that it might be helpful to the committee if I tried to explain our efforts in the largely unplowed fields of informal action, representing only a small part of the Conference's total activities, but a fairly novel part in terms of work that has been done before. Probably 90 percent of the Government's activities takes place wholly outside the confines of the

Administrative Procedure Act and in the area which we call for want of a better term, informal action. Until very recent years, little or no attention has been paid this form of Government activity, either by the scholars, by the bar, or by the Government Establishment itself.

For 4 years now, we have been working in this territory and have accumulated a certain degree of experience, most of which goes to show that we know very little about the mass of informal and unstructured activity of the Government.

We have learned two things that I think are fundamental to the work of the Conference and the work of the Government. One is that there is a quite unbelievable diversity in function. There are probably thousands of particular agencies' functions no two of which are identical and very few of which are similar.

The second thing we have learned is that we have not yet studied a particular agency function which we have not found to be in need of substantial procedural improvement in order to assure expeditious and fairness to the citizens who are being subjected to the procedures.

We have proceeded in the past on the basis of an intensive study of particular agency functions: the SEC no-action letters; Immigration and Naturalization Service change of status procedures; more recently, the Parole Board. We found our studies rewarding and interesting and I believe in the end, they produced substantial good for the particular agency function. The difficulty is that if we are to proceed in this way, it would take something close to a century before we had even partially adequate coverage of the Federal Establishment.

We have after 4 years felt that the time might have come to see if any generalized code of guiding principles governing the informal process could be drawn. It is a task of prodigious difficulty in that no procedure devised with one agency function in mind can possibly be applied to one which was not in mind without very considerable reservations and ad hoc experimentations. We have thought that we could, and plan to over the summer, prepare a sort of working, tentative draft of what might be done in this. Then it would be our hope that there would be a substantial organized effort to have shallow depth studies of 40 to 50 agencies to see whether our initial notions were in any way sound or how they should be changed.

Hopefully, after 2 or 3 years, we will be able to bring to the Congress a proposal for a generalized code to govern this terribly important and almost universally neglected field of informal action. The project may not work; the diversity of function may defeat any sound generalizations. But it may be something that can be done and if so, it could represent an improvement in the quality of government comparable in conception to that of the Administrative Procedure Act and in terms of the millions of people affected probably of considerably greater importance. That project which lies dear to the hearts of my committee and to me is quite impossible under current budgetary limitations. It would take a staff of half a dozen or more to conduct the studies that would have to be done before the Congress could be approached. We hope from our viewpoint, the prospects of accomplishing something of major practice importance in a largely unstudied field, that we would be able to carry it forward.

My last comment is perhaps an inappropriate one. I am by nature uneasy if I have to compliment a man to his face. But I do want to

make two observations. In and out of Government service, I have been around this town for nearly four decades and very rarely have I seen so effective an administrator as the present Chairman of the Administrative Conference. If he is given more money, I can assure you it will be wisely and well spent.

That concludes my remarks.

Senator KENNEDY. That is very nice to say.

Mr. CRAMTON. I would like to say I approved his statement, but I did not.

Senator KENNEDY. It is certainly not said in a vacuum. It is certainly shared by many of us in Congress, too.

Mr. Cushman, did you want to make a comment?

Mr. CUSHMAN. I believe I will respond if there are questions on which I can help.

Senator KENNEDY. Mr. Gardner, you mentioned that "we have yet to study that particular agency function which is not badly in need of improvement." What does that say about the possibility for self-improvement of various administrative agencies?

Mr. GARDNER. Our experience has been, and as Mr. Cramton indicated earlier, our experience by and large has been better in dealing with a particular agency and the particular function. Our experience has been that by and large, the agencies are receptive to proposals for improvement and without exception, have cooperated with us thoroughly and with only passing exception have at least understood what we are driving at and in general have agreed with it. It requires, however, a catalyst that is not ordinarily homegrown within any agency, certainly not within any with which I was ever associated. It takes a external look, in short.

Senator KENNEDY. Have you any suggestions about how a catalytic agent can be built-in within an agency so you can have that continuing, evolving self-improvement?

Mr. GARDNER. No, sir; I think to a degree, it is self-contradictory. I think if you had a homegrown catalytic agency, it would soon become house trained and almost inevitably so. You have, in short, in my view to have an external look in order to see opportunities for expedition, seek efficiencies and share in this. It is pretty hard to do when you are in the midst of the process itself.

Mr. CRAMTON. I might add a comment at this point. The work of the Conference is greatly aided when there are individuals and forces within an agency that are conscious of certain problems and themselves pushing in a particular direction. We come along as external critics and observers and look at the agency. The effectiveness of what we do is influenced favorably not only by the existence of forces in the agency which want to move in the same direction, but also by similar forces in the external environment, whether they be congressional committees or the media or the courts. If these external and internal forces are nudging in the same direction, or at least posing the same problem, the chances of a reform of the agency's policies and procedures are much enhanced.

Senator KENNEDY. You mentioned that you have had varying relationships with the various agencies themselves in your recommendations, as I understand them. Would you be prepared to indicate which agencies are particularly receptive and responsive to the kinds of rec-

ommendations for self-improvement that you have made to them and then perhaps on the other hand those which you have had more difficulty in attempting to move or adjust?

Mr. CRAMTON. If I had to make a kind of rough, across-the-board, governmental answer to that, I would say that the newer the department in terms of its age of creation and the newer the agency, the more sensitive and responsive it has been. The Department of Health, Education, and Welfare, for example, under its present Secretary and leadership, has been extremely responsive and interested in the Conference and its activities. Recommendation 29, concerning the Food and Drug Administration, for example, was immediately implemented by the Food and Drug Administration.

But other than that, I think the pattern is extraordinarily variable. All of the agencies we have studied have been highly cooperative in terms of access to information; their sympathy with the particular results and conclusions has varied. The more general the recommendation, the more difficult of selling it across-the-board, for precisely the reasons that Mr. Gardner suggested—the diversity and complexity of Government is such that what may be tailor-made for one agency does not fit another.

Mr. GARDNER. I would take a mild exception to one of Mr. Cramton's points. The Department of Justice, I believe, was created in 1790 and has been thoroughly cooperative in our own work with them, in part because a very able man from the Department of Justice sits on our committee. But I would not rule out departments of great age in having new ideas.

Senator KENNEDY. What would be the sort of recommendations you would make as to the Justice Department, since you mentioned that?

Mr. GARDNER. We have had three areas in my committee, the only one to which I can speak, involving the Department of Justice. We got started on a small project, our very first one. We sort of got our feet wet on the procedures by which fines and penalties were subject to mitigation or remission. The Department accepted our recommendations, which is fairly routine, but included letting the man know what the problems were and advising him of the decision and making files available as has been required by the Administrative Procedure Act. It was accepted immediately. We never even put it to the Administrative Conference.

Again, we had a mammoth study made by Professor Sofaer of Columbia of the Immigration and Naturalization procedures, probably the most intensive study of an agency and its functions that has ever been undertaken. The Service was thoroughly cooperative with the study at all points and not completely, but in major degree, is slowly accepting the recommendations.

In the last few months, we have been looking at the Parole Board procedures, which I think everyone will agree were regrettable, but almost inevitable in view of the volume of business they have—90 decisions a day is pretty hard to carry on in a judicious fashion. I do not know whether it is because of the wisdom of Mr. Cramton's Administrative Conference or pressures from outside such as the Kastenmeier bill and a certain number of court proceedings, but they in the end seemed to me to be thoroughly receptive and I have high hopes of a very large amount of improvement in that activity.

Those are the examples at hand. I, for one, have no complaint about the Department of Justice, however ancient a Department it may be.

Senator KENNEDY. You have given us some of your successes. What have been some of your difficulties in getting agencies——

Mr. GARDNER. Our failures, sir, number about 25,000, the agency functions that we have not studied. It is entirely too slow a process the way we are now set up, which is why I am so anxious to have a try at a generalized procedure.

Senator KENNEDY. What percent of your studies and recommendations are implemented, what are rejected?

Mr. CRAMTON. On that, it is really almost impossible to say, in large part because it would require an enormously detailed study and investigation even to learn the degree of compliance with the recommendations of a very general character. We have done that with a few recommendations. For example, on the implementation of the guidelines in the Freedom of Information Act, we have done some extensive followup and we know pretty much in terms of the adoption of procedural rules where all Federal agencies and departments stand on that recommendation. Most of them have gone a ways in terms of the procedures by which they handle information requests. The harder question, of course, is how much have attitudes changed? The question of whether agencies are complying with the spirit of the Freedom of Information Act gets you into very difficult and subjective judgments on which reasonable people can differ. All I can say is that progress has been made.

Now, when you get to more specific recommendations like the one I described dealing with the Food and Drug Administration, or the recommendations that Mr. Gardner spoke of, it is much easier to summarize the implementation story since they each are directed to a single Federal agency. One of them, dealing with the Immigration and Naturalization Service, has yet to be implemented. We are very, very hopeful that the recent recommendation with respect to Parole Board procedures will be implemented in the near future. It has not been yet, but it is only 2 weeks old.

Mr. GARDNER. We can hardly have expected it to have gone far.

Mr. CRAMTON. Implementation is a mixed bag. The more specific the recommendation and the more it is supported by outside forces, the more likely is its adoption. But even the general recommendations have received a great deal of response.

Some of the details with respect to individual recommendations are contained in the appendix to my prepared statement and we would be happy to supply more details on request.

A recommendation that Mr. Cushman has called to my attention is probably the alltime leader in terms of general adoption. This is recommendation 16, which called on Federal agencies to abide by the requirements of the Administrative Procedure Act for notice and comment on rulemaking, even in situations involving public lands, property, grants, and benefits, in which the APA does not now require such procedure in connection with rulemaking. That recommendation has been almost totally implemented by all of the major executive departments and administrative agencies.

Senator KENNEDY. Do most of the contracting agencies cooperate in this?

Mr. CRAMTON. No, they do not. As our report on this recommendation makes clear, the two or three largest contracting agencies, particularly the Department of Defense, have taken the view that the recommendation is inappropriate in the Government contract field. As a result, they have not complied with that particular recommendation. We are now pursuing that matter further in connection with a general review of the exemptions from the rulemaking provisions of the Administrative Procedure Act. We hope by next fall, and hopefully by December, to have a more detailed treatment of the Government contract question so that we can determine whether or not those agencies are justified in saying that they would have difficulty complying with what we view as the relatively minimal notice-and-comment procedure of the Administrative Procedure Act in rulemaking in the Government contract field.

Senator KENNEDY. How frequently are there attempts by political appointees to frustrate or even stop your inquiries, to dampen down the recommendation?

Mr. CRAMTON. There has not been a single example of this thus far in my tenure as Chairman. Now, I have to qualify that by saying that prudent decisions are sometimes made about the likelihood of access to information that will be needed in making a study.

For example, during my predecessor's regime, it was felt that cooperation from the Selective Service System, with General Hershey as its presiding officer, would not be forthcoming. In fact, that seems likely, because General Hershey, as a member of the Conference, made it very clear that he was not likely to cooperate in a Conference study.

Subsequent to that time, we have undertaken a study of the Selective Service System which is now in process. We hope to have recommendations which will deal with local board procedures, and particularly with the desirability and appropriate form of judicial review of Selective Service determinations. While General Hershey was in charge, however, a decision was made that it was unwise to waste resources, particularly the resources of such a small agency, in areas where cooperation and access to information would not be very likely. To that extent I and my committees take into account the likelihood of cooperation in deciding what areas we are going to study.

Senator KENNEDY. But you have not, just in the time that you have been in, felt interference or pressure by political interests or forces or appointments?

Mr. CRAMTON. No, the pressure has been more the other way. We have been drawn into several areas because either congressional committees or administrative agencies or the administration has suggested a particular problem as a fruitful area for inquiry and study. For example, we got involved in assessment and review of the Ash Council report on independent regulatory agencies at the request of the administration. The Joint Committee on Atomic Energy got us involved in a study of nuclear reactor licensing. I and my staff have been drawn into evaluation and assessment and critique of some of the various proposals in the consumer field, especially the administrative procedural provisions of them, at the request of congressional staff who wanted some help and assistance, and though we were knowledgeable and could provide it.

Thus to the extent that the political process has intervened, the intervention has invited us into areas in which we otherwise might

not have become involved. We have to be careful of our limited resources, so that we do not get drawn off too much doing jobs that others would like to have us do for them, rather than jobs that we think need to be done in terms of where the future is, where the needs are, in terms of development of the administrative procedure in the United States.

Senator KENNEDY. Can we recess for 10 minutes? There's a vote.

Mr. CRAMTON. Surely.

(Recess.)

Senator KENNEDY. We'll come back to order.

This is also, as you know so well, a subcommittee of the Judiciary Committee. The Judiciary Committee has held a series of hearings on the whole I.T. & T. affair. One of the questions was the range of contacts that are made by parties that have matters of interest with a particular department and then the relationship of certain departments with other agencies, and those levels of contact. There was a great deal made of some of these contacts that perhaps should not have been made; there were other things that probably happened that the committee was unable to gain access to and perhaps did a disservice, really, to the nominee. I think it is awfully difficult to really know the final judgment on it. But have you gotten into this type of matter which is ex parte contacts, and if you have, what can you tell us about it?

Do you have studies on it? How can you help to avoid at least the kinds of appearances that I think cause great concern, quite frankly, to the many millions of Americans in that case?

Mr. CRAMTON. The question of prosecutorial discretion, and of negotiated settlement of pending matters is part of that vast domain of the informal administrative process to which Warner Gardner referred.

Incidentally, Mr. Gardner asked me to convey his apoligies; he had to get back to his office and has left me holding the fort.

Senator KENNEDY. Fine.

Mr. CRAMTON. The Conference has three or four of the very finest law professors in the country who are now embarking on a series of interrelated studies of prosecutorial discretion in a number of Federal agencies and departments—the Department of Justice in handling regulatory crimes; the Federal Trade Commission; the Food and Drug Administration; and the Securities and Exchange Commission. We hope by putting all of these studies together to develop some insights on which we will be able to generalize about prosecutorial discretion. What information ought to be made available to the public? To what extent should standards be evolved? To what extent should reasoned statements be made when cases are settled and dismissed? To what extent should there be public participation in that settlement process which now, as you know, is totally unstructured and for the most part secret?

All I can say at the present time is that we think the subject is important and we plan to study it. Obviously, we do not know what we shall come up with. It is a difficult and complex subject. There may be aspects of it that for privacy reasons alone will require society to go slowly in terms of opening up the process too far.

Senator KENNEDY. Is there any reason that the contacts should not be made public? The fact that there was a contact made, should that be made public?

Mr. CRAMTON. I suppose that the countervailing argument would have to be one of inefficiency resulting from detailed diary keeping on the part of Government officials, if they were required to record every phone conversation and letter that pertained to a matter. Such a requirement would in itself be burdensome and might stifle initiative. I do not know myself to what extent that may or may not be true.

Senator KENNEDY. Should we not know? Is that not a matter of considerable importance? Or what importance do you put on it?

Mr. CRAMTON. It surely is, particularly in the civil antitrust or Federal Trade Commission context. On the other hand, there may be matters where the interests of governmental efficiency and privacy would argue in the other direction. In other words, once you start opening things up, access might be available and publicity made about the fact that a Government agency investigated an individual or businessman, considered moving against him, and decided for one reason or another, maybe for absence of evidence, maybe they did not have a case, maybe because he was not violating the law—not to proceed. That information might be picked up and used against him. So there are privacy interests involved in the area of prosecutorial discretion.

We have not resolved these issues. I agree with you that the problems are great.

Senator KENNEDY. Is that under consideration?

Mr. CRAMTON. That is right. We have a whole series of studies on which we are embarking and which we hope to be able to finance. It is my hope that, if our appropriation ceiling is raised or eliminated, we would be able to persuade our appropriations committees that studies of this kind have such a large potential for improving the quality for the administration of justice that we should be given sufficient support to undertake them.

Senator KENNEDY. The fact that there was some contact made, is that being considered, too?

Mr. CRAMTON. Oh, surely.

Senator KENNEDY. What about, now, the relationship between the agencies? I mean the contacts that were made. Say the White House and agencies. Is that also a question that you are going to consider?

Mr. CRAMTON. The academic investigators plan to consider the whole question, including the potential of congressional inquiries, White House inquiries, as part of the process by which decisions are made whether to proceed against X, not to proceed against Y, to drop the case against Z, and to settle against someone else.

Senator KENNEDY. So that is considered, too?

Mr. CRAMTON. That is right.

Senator KENNEDY. So at least we will have some kind of guidance. I think it would be enormously important to guide it from the members point of view—to have some kind of feeling of what is legitimate in terms of this type of thing.

Mr. CRAMTON. These are governmental processes that no one has systematically studied. The Conference has an opportunity to get access on a confidential basis, for example, to the Federal Trade Commission's or the Food and Drug Administration's records and files, and

then to try to find out what are the considerations that seem to influence prosecutorial discretion and how does the political process intervene.

Now, the one preliminary study that has been done in this area so far for the Conference, by Professor Rabin of Stanford, tends to indicate that, insofar as U.S. attorneys are involved in terms of the prosecution and enforcement of regulatory crimes, it is a relatively rare situation in which the political process intervenes. Most of the other factors are far more important. Whether or not that will prove to be the case in other contexts remains to be seen.

Senator KENNEDY. Have you thought about the procedures followed with the announcement of these consent decrees, where there is painfully little information that is made available?

Mr. CRAMTON. Well, that is right. That is part of the same question. In fact, Prof. Ernest Gellhorn of the University of Virginia Law School, who will be doing the study with the Federal Trade Commission, is going to start with the consent decree process and then move into prosecutorial discretion at the FTC more broadly. They are part of the same thing. You cannot talk about the enforcement and consent and settlement process except as a related service of processes.

Senator KENNEDY. The consumer protection agency legislation will be coming before the Senate soon—next month. It provides for advocacy on behalf of the consumer in formal agency proceedings. To what extent should a consumer advocate be invited and allowed to come before these proceedings and how should this——

Mr. CRAMTON. The bill in its present form takes the position that the consumer advocate ought to be allowed to do whatever other private participants are allowed to do in the particular governmental function. If the agency before it settles a case talks with a trade association, it ought to talk to the consumer advocate. He is then entitled to talk to the agency, too, about the same matter, the decision or rule, to prosecute, not to prosecute, or to undertake a particular activity. I share that position.

Now, there have been a lot of problems in terms of drafting the legislation so that could be done in a way that would not interfere too much with this unstructured, informal administrative process of which Mr. Gardner spoke. But I think the bill in its present form is a very careful drafted bill.

Senator KENNEDY. Should the consumer advocate have the same standing or should he have a better standing than the——

Mr. CRAMTON. To intervene?

Senator KENNEDY. To intervene, yes.

Mr. CRAMTON. He is now given the standing, really, of anybody else. If other people participate, he is allowed to. He has been given broader standing to get judicial review than other participants under the Senate bill. My position all along has been that the consumer advovate should have the same rights as other participants in administrative proceedings, but it is unwise to make him a "superparty." It is also equally unwise to make him a "miniparty." He ought to have the same rights as other parties. If other people formally participate, if other people can subpena documents and so on, he should be able to do so also. The present Senate bill goes somewhat beyond that. I do not know that he is quite a superparty, but he has more powers

than the other persons in the process. How far along that avenue one ought to go is a question, it seems to me, on which reasonable people can differ.

Senator KENNEDY. Should not he be able to go somewhat further than the other parties? Does not the consumer interest or the representative of the public interest have a broader responsibility generally in these various questions?

Mr. CRAMTON. It is true that he is representing a very broad and general public interest. On the other hand, you do not want to run the risk or possibility that he would use a kind of tactically superior position to take away from agencies their ability to control their workload, their priorities and the like, by either forcing them to undertake proceedings that they do not think they have the manpower or the energy to undertake at that particular time; or by delaying proceedings merely because consumers would be benefited by the lag. An agency may have good reason to decide against the position which the consumer advocate thinks the consumers interest is. In other words, I think a balance needs to be drawn between useful advocacy and the danger of disrupting or delaying the administrative process.

Either the Senate or the House bill in their present form give the consumer advocate very adequate powers to represent the interests of consumers. The Senate bill gives somewhat broader powers, and if the Congress desires a broadening of the power of the consumer advocate, its provisions would be preferably.

Senator KENNEDY. I understand that with some dissent, the Conference decided not to recommend that agencies experiment with paying attorneys fees and witnesses expenses and public interest intervenors. Could you explain the rationale for stopping short?

Mr. CRAMTON. It was really, I suppose, a conservatism about the implications of the untried and the feeling that we needed to accumulate more experience before experimenting with agency policies which would reimburse citizen groups for attorneys fees and expert witnesses fees. The recommendation does provide, however, for reduction in transcript costs, reduction in multiple copy requirements, and the like, all of which are very substantial impediments to public participation. It also urges agencies to make available expert witnesses that are on their staff for participation in public proceedings.

Here we are in a dilemma of competing values. You do not want to encourage useless proceedings by holding out too much of a reward for members of the bar to seek to take cases on a contingency basis, hoping that their expenses will be reimbursed after the fact very generously. We should not turn various areas of public life into a full employment bill for lawyers or toward an encouragement of litigation qua litigation. Maybe other techniques for solving social problems will be better than the courtroom or a formal administrative proceeding. And the Conference drew that balance. It said, as of right now, we want to let the public in, let them participate, cut the costs of participating, but not go to the other extreme of actually encouraging and subsidizing that participation by funding attorneys' fees and expenses. I think that is the explanation.

Senator KENNEDY. You have 88 members on the Conference now. Can you tell us a little bit about the efforts that are being made to include

in that group members of minority groups, the poor, consumers, environment lists, and other under-represented people in the Government?

Mr. CRAMTON. I think it is a very diverse and balanced group. I have a recent membership list which we can submit for the record if you would like to include it.

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Mr. CRAMTON. In the membership as of July 1, there are two highly qualified and well known environmentalists, David Sive and Owen Olpin, as well as some members of the private bar representing utilities and others who have experience of another kind of environmental problems.

In terms of minority-group representation, the group that is badly under-represented in the Conference is women; that majority of the population does not come off very well, either by the Government agencies designating members or through the appointment of public members. I think we have three or four of our 88 members who are women. And there are, I think, four black members, two designated by Government agencies and two as public members. It is a problem that we are working on. The difficulty is that we do need people who have a special interest in administrative procedure and a special background in it. We have had several extremely active, intelligent, able black lawyers and women, such as Pat Harris, who, before she took on some recent assignments, was a very active participant in the Conference. Some others are Jean Camper Cahn, Ragen Henry of the Philadelphia bar, and the like. I have also made an effort to attract to the public membership of the Conference some people other than the elder statesmen who participate in an enormous variety of American bar and judicial and other activities in an attempt to get a leavening of extremely active and interested younger lawyers and persons interested in public administration.

Senator KENNEDY. How many vacancies do you have coming up in the next, say, 8 months, or year?

Mr. CRAMTON. All of the appointments to the public membership of the Conference are for 2-year terms, which expire at the end of this month. The reappointments have all been made, so that unless and until members of that group resign, there will be no vacancies as public members of the Conference. Now, there is some constant turnover in terms of the members designated by the Government agencies, since when a Government employee who is a member leaves the Government, he automatically ceases to be a member of the Conference and the Agency designates a replacement. So there is always some turnover on that side.

Senator KENNEDY. Is this new group coming on, is that going to change the balance to any appreciable extent?

Mr. CRAMTON. I think it is going to improve it in all respects. That is, it is a younger group, it is a more diverse group geographically, and also in terms of the balance and diversity of the interests and groups in society who are represented.

Senator KENNEDY. Just reviewing your statement very briefly, you indicate the studies that were being undertaken by the Conference. It did not appear that there were many that were targeted toward the poor, the black, or the Chicano, the Indian, or the elderly. Could you tell us, is that because they do not, as a group, get involved in the procedural issues, or because they are too controversial?

Mr. CRAMTON. I am not sure I would agree with the statement in the first place.

Senator KENNEDY. OK.

Mr. CRAMTON. In the first place, let me mention Indians. We have just completed one study of the conflict-of-interest problems in the Department of the Interior and the Department of Justice in handling Indian natural resource problems. The Committee on Claims Adjudications now has before it a massive document prepared by Professors Chambers and Price of UCLA—two well-known lawyers interested in Indian law—which deals with the leasing of Indian lands

by the Department of the Interior, a problem of enormous importance to the tribal reservations and members of Indian tribes.

In terms of old people and their problems, the study of disability benefits that I mentioned previously is really one of, I think, the premier problems of older Americans. That is, the determination whether they are disabled from work and hence eligible for disability benefits is a matter of particular significance to older Americans.

The emphasis in several recommendations on public participation in the administrative process is one which is concerned with the representation of otherwise inadequately represented groups, such as blacks, consumers, poor people, and the like.

The concern with the informal administrative process also tends to provide protection to many groups that are unrepresented, such as aliens, who do not even vote. The congressional committees may not be as interested in them as they are interested in older citizens who can vote. Certainly, the members of the organized bar and of the university community have not spent a lot of time dealing with the problem of aliens. Welfare procedures, eligibility and access to public housing, removal from public housing—these are all problems, it seems to me, of vital importance to minority groups, to relatively poor citizens, and the like.

Of course, the parole study also deals with a portion of the population convicts, which tends to be deprived of their civil rights in general and tends to be of the lower socioeconomic status than the rest of the population.

I would say that a goodly portion of the activities and studies of the Conference are concerned with the effect of government on small people.

Senator KENNEDY. I think that is certainly our interest, my interest, as well.

Do you think it is really possible to find a balance between the formal procedures which can be applied rigidly and thus more equitably for all and which are timeconsuming, costly, and often confusing, and informal procedures which accommodate themselves to a layman to subject themselves to perhaps abuse and inequity?

Mr. CRAMTON. I think it is. We have tried to balance those interests in making the Parole Board study. What we have said is that there are certain minimal procedural safeguards that every incarcerated person ought to get in terms of the determination of release that is involved in the parole matter. First, he ought to get a brief statement of the reasons why he is denied parole.

Second, the Parole Board ought to enumerate standards and policies which prisoners can understand and attempt then to frame their release plans and their future so they can try to meet them.

Third, they ought to have some opportunity for oral confrontation in which they can give their view, and in that oral interview or hearing—not an oath-taking, lawyer-dominated hearing, where people are sworn in, testimony taken, and cross-examination but a very informal interview or hearing—they ought to have a right to have an attorney or other supporter stand by them and give them moral support in dealing with what is often a very remote, unfriendly, bureaucratic government. And the recommendation has some other features as well. But these basic procedural ingredients, we think,

can be provided with a very minimal elaboration of additional personnel and yet will improve the confidence of prisoners in the system and reach better results.

Senator KENNEDY. Mr. Williams, who testified in 1969 said, "Let me make it clear, I do not contemplate expanding the Administrative Conference into an organization that will require more than $500,000 a year for the reasonably foreseeable future."

Could you tell us why you think a larger budget is justified?

Mr. CRAMTON. In the context of his full testimony, he was talking about the fiscal needs for the next 2 or 3 years from 1969, and that 3 years is now up. So that would be my first response.

Second, beyond that, the activities of the Conference have grown substantially in the meantime. The Conference in 1969, when Chairman Williams was testifying, was a very new and untried organization, barely gotten started, which had just held its first meetings. As a result its track record was very minimal and limited. But there are now 4 years of experience: reports and recommendations are available and the committees of Congress have begun to utilize the Conference quite extensively for help in drafting and commenting on legislation. The administrative agencies have started to use the Administrative Conference for certain advisory functions in connection with general matters of administrative procedure. The studies and recommendations of the Conference are not merely accumulating on library shelves and acquiring a great deal of stature and representation around the country in the academic world, but they are having impact on how Government officials behave. I think that demonstrated track record plus the opportunities for further service which are outlined in the prepared statement clearly indicate that we can wisely spend more than our present appropriation ceiling in studying how the Federal Government operates.

It is an odd thing that the Federal Government will spend hundreds of millions of dollars, even billions, in grants to State institutions, in research activities in the health and medical area, in disseminating money to States that then make plans and study their own procedures and processes. But the Federal Government spends very little money in examining its own processes and how its officials behave. The Administrative Conference is one of those organizations which can broaden the perspectives of Government, look at the agencies and their activities from the outside, and yet from the inside as well, and be a constructive catalyst for social change and reform.

Senator KENNEDY. We have the sovereign immunity bill up before the full Judiciary Committee tomorrow. I know you testified 2 years ago about the importance of that legislation. Is there anything you can tell us that I can bring to that full Judiciary Committee tomorrow about the importance of that legislation? Is it as important today as it was before?

Mr. CRAMTON. It is just as important as it was before. It is very badly needed legislation. The trend of judicial decisions, although to some extent they cutback on the breadth or the sway of the soverign immunity doctrine, has not decreased at all the confusion and chaotic nature of its application and the occasional injustices which result.

Moreover, two other changes have made the elimination of sovereign unity as a barrier to judicial review in administrative action even more

necessary. That is the change of position by the Department of Justice on exposing the Government to new suits and liabilities. The Department of Justice has gone on record as supporting the enactment of quiet title legislation which now, for the first time, would allow property disputes against the Federal Government to be litigated in Federal courts. That is a far more serious waiver of sovereign immunity in terms of the number of cases that are likely to result than the more limited proposal which this subcommittee has favored.

Moreover, the waiver of sovereign immunity that is involved in the Indian Trust Council legislation that the Department of Justice also supports indicates that the trend is in that direction and that now is the time to strike and complete the job.

Senator KENNEDY. Well, I want to thank you very much for appearing here. From everything that I have heard, not only this afternoon but in the past, the leadership that you have provided has been a leadership of courage and sensitivity. We want to applaud those efforts and indicate that many of us want to give you all the support that you feel that you need here in the Senate. I want to thank you very much for your splendid comment here this afternoon. I look forward to working with you.

The subcommittee will stand in recess.

(Whereupon at 4:05 p.m., the subcommittee recessed subject to the call of the Chair.)

APPENDIXES

Appendix A.—Correspondence With Respect to the Work of the Administrative Conference

A. AGENCY LETTERS

1. Department of Justice. Acting Attorney General Richard G. Kleindienst, March 20, 1972:

I am writing to complement the Administrative Conference for its work in improving the quality of administrative justice meted out by Federal agencies. A number of studies and recommendations of the Conference have been of great interest and value to the Department of Justice.

As you know, the study by the Conference of this Department's procedures for the remission and mitigation of forfeitures led to our adoption of new regulations with respect to such procedures. Similarly, we have found that the recent recommendation of the Conference with respect to the procedures of the Immigration and Naturalization Service in change-of-status cases rests upon a thorough analysis of this important process. The Service has already adopted some of the suggested changes and is giving most careful consideration to the others. The Department, of course, has a special interest in the recommendations of the Conference establishing guidelines for implementation of the Freedom of Information Act in view of our responsibility to defend the United States in suits brought under the Act.

While the Department has not always been fully persuaded by some of the Conference's proposals—I refer in particular to our reservations concerning the proposal of a statute to eliminate the defense of sovereign immunity in actions seeking review of Federal administrative action—the scholarship of the Conference has invariably been excellent, its research well-considered and its work-product most useful.

2. Department of Health, Education, and Welfare. Secretary Elliot Richardson, March 21, 1972:

It is difficult to assess fully the impact of the Conference on this Department. Many of the things with which the Conference has been concerned and which have been embodied in various of its recommendations have received concurrent attention in this Department. * * * In short, the process had not been one of our simply reacting to Conference recommendations; rather, it has been a dialogue in which our own knowledge and depth of perception have been increased, and, hopefully, the Conference for its part has gained insights by reason of our experience and institutional judgment.

This type of dialogue is essential, I believe, to the enlightened development of administrative law and procedures bearing upon the rights of private citizens. It has been tremendously valuable to this Department.

The recommendations of the Conference fall, I think, into three general categories. First are the housekeeping sort, relating to the collection and publication of statistics, the development of a "consumer bulletin", the provision of adequate hearing facilities, improvements in the form and content of the U.S. Government Organization Manual and of the Federal Register, and the like. This type of recommendation serves a very useful function and one that no other agency of the Government, of which I am aware, is well designed (or perhaps willing) to fill.

The second type of recommendation has been directed to specific procedures of specific administrative agencies, such as the duplicative hearings in FAA safety certification cases, the SEC no-action letters under Section 4 of the Securities Act, the procedures of the Immigration and Naturalization Service respecting change-of-status applications, and the like. The only recommendation of this type directed specifically to practices of this Department was Recommendation

29, relating to rulemaking on a record by the Food and Drug Administration. We have already advised you of our essential concurrence with that recommendation and the fact that the procedures which it recommends have been adopted or are being adopted. If the Conference's recommendations specifically directed to other agencies have been as perceptive, constructive and carefully articulated as Recommendation 29, I have little doubt that the various agencies have directly benefited from your effort.

The third type of Conference recommendation is directed at fundamental problems of the rulemaking, adjudicatory and informal decision-making process and cuts across subject matter and Departmental lines. In this area the work of the Conference is invaluable. It is very difficult for administrators to step back from the demands of day-to-day decision-making sufficiently to get a broad view of the scope of the problems and the developmental trends in the decisional process. And yet this must be done. We are almost daily making small, incremental decisions on hearing procedures in rulemaking under FDA, in fair hearings under public assistance or in review of grant decisions that are quickly (and necessarily) structured into our day-to-day activity in a way that makes them very difficult to change. We rarely have the time, resources or immediate incentive to inquire whether the procedures are consistent with each other, whether they are fair and whether they are as efficient as they might be. This is a function which the Conference serves so admirably. It has long been clear that the Conference has the diversity of talent and the professional detachment for this task. I can only hope that the work of the Conference will continue and expand.

There is no other area of law and practice that more needs the type of careful study and thoughtful recommendations that the Conference can supply.

3. Civil Aeronautics Board. Whitney Gillilland, April 17, 1972:

I am pleased to report, in response to your request in the letter to Chairman Browne dated December 17, 1971 transmitting the Recommendations of the Administrative Conference of the United States adopted at its meeting last December, that of the applicable recommendations the Civil Aeronautics Board is in substantial compliance with Recommendation 28 and is presently preparing to fully implement Recommendation 30.

Recommendation 28 reflects procedures and practices which have long been in effect at the Board. Thus, existing rules amply provide for participation in notice-and-comment rulemaking proceedings and intervention in adjudicatory hearings in the manner and to the extent provided by the Conference Recommendations. Further, the criteria set forth by the Conference on giving public notification of proceedings, filing and distribution requirements and making available information and assistance might well have been patterned, in all substantive respects, after present Board practices.

* * * * * * *

I am happy to report further that the Board is of the opinion that the recommendations advanced by the Administrative Conference will work toward improving the proceses of government which vitally affect the rights of citizens and the well-being of the economy.

4. Food and Drug Administration. Commissioner Charles C. Edwards, April 13, 1972:

Since the very constructive meeting we held last December to discuss implementation of *Recommendation 29—Rulemaking on a Record by the Food and Drug Administration*, our staff has had an opportunity to give further thought to the excellent study prepared by Professor Hamilton and to the incisive recommendations to improve our formal evidentiary hearings.

* * * * * * *

The offer of Professor Hamilton to assist us in the drafting of regulations will undoubtedly result in the implementation of a substantial part of the remaining Conference recommendations in the near future. It is our expectation that these changes will be most helpful to us in our continuing effort to improve our procedures for the handling of complex food and drug proceedings.

On behalf of the Department I want to express my very sincere appreciation for the most useful and constructive assistance you have rendered to us. If the experience of the Food and Drug Administration is my guide, the Administrative Conference is rendering a most valuable service in improving federal administrative procedures. We look forward to working with you in the future in other cooperative efforts to further improve our ability to serve the public.

B. CONFERENCE MEMBERS

1. Arthur E. Hess, Deputy Commissioner, Social Security Administration, Department of Health, Education and Welfare, March 8, 1972:

As you know, I have been a member of the Administrative Conference for over 2 years serving as one of two designees from the Department of Health, Education, and Welfare. During this period I have seen the Conference grow in stature and develop the machinery to perform important services for the Federal Government and the public at large.

Through my participation and membership on the Committee on Informal Action. I have seen a number of important studies completed that were sponsored by the Conference. These cover individual agency problems as well as problems that are common to a number of agencies. The studies were subjected to the rigorous test of challenge and discussion by Committee members, to comment and consultation with interested agencies, and ultimately to action by the full Conference. In each instance I have felt that not only was the subject matter of the recommendations important to the rights of individual members of the public, but the agreements achieved went beyond anything that one would normally have expected in the framework simply of agency-sponsored studies covering similar ground.

The Conference record speaks for itself, but I felt it might be of interest to you to have the reactions of one participant. While there have been a number of Conference activities with which I did not fully agree, this is inherent in a democratic procedure. On balance, I think the Conference activity is beneficial to all three branches of the government. It provides a forum for bringing together the points of view and experience of many different individuals from organizations that would not necessarily otherwise be brought into consensus, and permits issues to be tested against the judgments of a wide range of public and private administrative experience.

Of course, the membership, public and private, give generously of their personal time to assure the success of this activity. Consultants, also, have been generous in their arrangements. I hope the scope of Conference activity can be expanded and will be supported with adequate funds.

2. James T. Ramey, Commissioner, Atomic Energy Commission, March 15, 1972:

I am writing as one of the Charter Government members of the Administrative Conference, and as a former Chairman of the Committee on Licenses and Authorizations for more than two years. I am especially pleased to see that the Administration has concurred in the recommendation of the Council and the Assembly and supports our legislative proposal to remove the ceiling on Conference appropriations.

I have been impressed by the high calibre and utility of Conference recommendations, particularly as they relate to the proceedings of the Atomic Energy Commission. As you know, the Commission has established an Atomic Safety and Licensing Appeal Board along the lines of Recommendation 6; was most actively interested in and aided by the proposal on licensing alternatives (Recommendation 15) and has taken steps to implement other recommendations, such as those involving discovery (Recommendation 21) and the Freedom of Information Act (Recommendation 24).

We are particularly indebted to the Conference for the study that was made and the one under way in which research is being made for new techniques and procedures for the handling of complex technological questions such as those involved in our nuclear power plant licensing proceedings. It is this kind of in-depth scholarly work involving pressing problems of current interest which sustains the confidence we have in the Conference and the need to give it the support necessary to its expanding role.

C. OTHER PERSONS

1. Honorable Chet Holifield, Chairman Committee on Government Operations House of Representatives, November 10, 1971:

I am writing to express my thanks for the assistance which you provided to the Committee in its consideration of legislation to establish a Consumer Protection Agency. Your expert advice and counsel was most helpful to us as we considered the many complex administrative questions which this legislation involved.

Although I was unable to be present when you testified at the Senate hearing on this subject, I read a copy of your testimony. My staff informs me that

you made an excellent presentation, and I want you to know how much I appreciate your contribution to the development of effective legislation.

2. *Honorable Virginia H. Knauer*, Special Assistant to the President for Consumer Affairs, the White House, March 17, 1972:

It is a pleasure for me to take this opportunity to advise you and the Administrative Conference of the United States of the helpful and informed service which the Conference staff has furnished this office during the past year.

A number of the consumer bills pending before Congress raise subtle and sophisticated issues of administrative law and practice. You and members of your staff have been very helpful in advising us of your views and sharing with us your expertise on many of these complicated problems. I particularly appreciate this service in light of your limited staff capabilities. Clearly, on the basis of my experience with your office, I would strongly echo the Administration's support for legislation that would eliminate the appropriation ceiling for the Conference and make several other changes of a technical nature in the Administrative Conference Act.

You and the other members of the Conference are to be commended for the outstanding manner in which your professional competence is brought to bear on important public issues. I know that enactment of this legislation will assist you in carrying on this important enterprise.

3. *Victor H. Kramer*, Director, Institute for Public Interest Representation, Georgetown University Law Center, March 23, 1972:

The work of the Administrative Conference, I think, has made a very real contribution to the public's interest in improving the federal administrative process. As you know, I have had particular occasion as a public interest lawyer representing clients who have intervened in adjudicative proceedings to call the Conference's Recommendation 28 to the attention of administrative agencies. While I am sure that that Recommendation, designed to ease the financial burdens of public interest organizations involved in federal administrative proceedings, could safely have gone further than it did, I believe the Recommendation is an innovative and helpful contribution to the public interest.

In addition to that, I have noted other reports and sudies of the Conference which have been most helpful, in my judgment.

I hope that the value of the work of the Conference will be recognized by the Congress and that the Congress will be encouraged to continue and, if possible, expand its work.

D. RESOLUTION OF AMERICAN BAR ASSOCIATION

AMERICAN BAR ASSOCIATION,
Chicago, Ill., February 23, 1972.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR EASTLAND: At its mid-year meeting on February 5, 1972, the Council of the Section of Administrative Law of the American Bar Association adopted a resolution pertaining to the funding of the Administrative Conference of the United States, a matter which, I understand, is now being considered by your Committee.

The text of the resolution, and the accompanying report, are as follows:

RESOLUTION

Be it resolved that the Council of the Administrative Law Section of the American Bar Association recommends that the Administrative Conference Act be amended in the following respects:

(1) That the provision with respect to the appropriation ceiling applicable to the Administrative Conference of the United States, 5 U.S.C. 576, be revised to authorize the appropriation of "such sums as may be necessary to carry out the purposes of the Administrative Conference as set out by statute," and

(2) That 5 U.S.C. 575 be amended to assure that the Administrative Conference has ample authority to contract, to engage consultants, to accept gifts and bequests, and to participate with other public and private agencies in studies and activities of mutual interest.

REPORT

The Administrative Conference of the United States, during its initial years of operation, has demonstrated a significant potential for bringing about improvements in the procedures and practices of the federal administrative agencies. The benefit from these improvements flows directly to the public in the form of more effective, fair, and efficient administrative proceedings.

The steadily increasing volume of such proceedings and their increasing complexity, as a result of new concepts and functions, including greater public participation and the desire to increase the representation of the public interest in such proceedings, is substantially increasing the need for the development of improvements in the procedures and practices of the federal administrative agencies. The cost to the public of a failure adequately to provide for such development would be immense, both in terms of dollars and social justice. Given funding adequate to the magnitude of the task, the Administrative Conference of the United States can make a contribution of inestimable value in this area. The present level of funding for the Administrative Conference is inadequate and places a severe limitation on the effectiveness of the Conference to deal with such problems, and retention of a statutory ceiling on annual appropriations in the Act may severely impede the ability of the Conference to obtain funding sufficient to meet future program needs as they arise.

It would also be desirable to clarify and broaden the authority of the Conference to contract for services, to utilize the services and facilities of others and to accept gifts an uncompensated services in order to permit the Conference to carry out its statutory purposes as effectively and efficiently as possible.

Therefore, the Council of the Administrative Law Section of the American Bar Association urges the enactment of legislation to amend the Administrative Conference Act, 5 U.S.C. 571–576, as set forth in the above resolution.

Your consideration of these views will be deeply appreciated.

Sincerely yours,

MILTON M. CARROW,
Chairman, Section of Administrative Law.

APPENDIX B—ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

SUMMARY OF RECOMMENDATIONS AND OF PROGRESS TOWARD THEIR IMPLEMENTATION

Recommendation 1: Adequate hearing facilities (adopted December 10, 1968)

Federal administrative agencies conduct thousands of public and evidentiary hearings each year in cities throughout the country. On many occasions these hearings have had to be conducted in grossly inadequate facilities. The recommendation seeks to deal with this problem by calling upon the General Services Administration, which has special responsibilities in this area, to establish criteria for hearing rooms, inventory the available supply, and establish procedures for making suitable hearing rooms available upon request to agencies which conduct hearings.

In accordance with the recommendation, the General Services Administration classified and inventoried available hearing facilities throughout the nation. This initial effort was followed by an order of June 1970 which sets forth procedures by which agencies may arrange for hearing facilities. The General Services Administration continues to add to its inventory of available space and, as new Federal buildings are authorized, recommends that hearing-room facilities be included in them.

The continuing importance of providing adequate hearing rooms for Federal administrative hearings is evident. The ready availability of hearing rooms n each city permits an expeditious and efficient scheduling of cases, with less delay to the citizen and lower cost to the Government. The availability of a suitable hearing room enhances the dignity and quality of the proceeding and conveniences its participants. The Conference plans to monitor the implementation of the recommendation by the General Services Administration by means of periodic surveys of agency experience in obtaining adequate hearing rooms.

Recommendation 2: U.S. Government Organization Manual (adopted December 10, 1968)

This recommendation was based upon a concern that the *U.S. Government Organization Manual* was not as useful as it could be because much of the text

was outdated and often uninformative. The recommendation was designed to improve the *Manual* by a revision, updating and simplification of its descriptions of agency structure and activities.

As a result of the recommendation, the Office of the Federal Register, which publishes the *Manual*, has made significant improvements in it. The descriptive statements of the various agencies have been revised in a common format and in language more understandable to the average reader. A most useful addition is a highlighted box which provides the office, address and phone number where further information may be obtained.

The recommendation has assisted the Office of the Federal Register in effectuating a substantial improvement in this important publication. Members of the public are assisted in obtaining accurate and current information about the activities, structure and personnel of all Federal agencies.

Recommendation 3: Parallel table of statutory authorities and rules (adopted December 10, 1968)

For many years the Code of Federal Regulations has contained a table consisting of a list of citations to the United States Code in numerical order and a corresponding list of C.F.R. citations indicating the C.F.R. location of administrative regulations which implement particular statutory provisions. The table has been of limited usefulness because it has not been kept complete and current. The recommendation urged that the Office of the Federal Register remedy these deficiencies.

The Office of the Federal Register advises that the parallel table of statutory authorities and rules is now complete and up-to-date. The Office plans to publicize the availability of the table to make it a more useful research aid. Lawyers and others who have need for ready access to regulations which implement legislation now have a reliable reference source.

Recommendation 4: Consumer bulletin (adopted December 10, 1968)

While the *Federal Register* has great value as an official and permanent record of notices and actions of Federal agencies, its inevitable complexity and bulk interfere with its utility in providing information to diffuse and unorganized members of the general public such as consumers. The recommendation called for the publication of an easily understood summary of the many activities of the Federal Government of interest to consumers.

The recommendation has been fully implemented. The Office of Consumer Affairs in the Executive Office of the President began the bi-weekly publication of *Consumer News* in April 1971. In February 1972 the publication was expanded by the inclusion of a *Consumer Register* which contains highlights of actions noticed in the Federal Register which are of particular interest to consumers. This publication, which is written in simple, nontechnical, laymen's language, reaches an estimated audience of 200,000 people and copies are distributed on a free basis to Federal and State officials and legislators, to members of the press, and to consumer groups.

Full implementation of this recommendation has provided the general public with current information about Government programs and activities which vitally affect their interests.

Recommendation 5: Representation of the poor in agency rulemaking of direct consequence to them (adopted December 10, 1968)

While Federal administrative agencies are highly responsive to the views and information they receive, the administrative process has suffered because only the views of highly organized groups, especially those which have a substantial economic interest in the proposed action, are consistently and ably presented. The views and interests of the poor, or of diffuse and unorganized groups such as consumers, have only rarely been heard in Federal administrative proceedings.

This recommendation, which preceded recent discussion of legislation to create an independent Federal "consumer advocate," is primarily addressed to enhancing the representation of the poor in agency rulemaking proceedings. It calls upon agencies to revise and strengthen their procedures to assure that the views of poor persons are considered in administrative actions which affect them. It also calls for the establishment by statute of an organization to act as

an advocate on behalf of the poor in Federal administrative proceedings and in judicial review of administrative actions.

Agencies which conduct proceedings affecting poor persons state that they are now making special efforts to see that the views of the poor are fully represented in these proceedings. In addition, a branch of the National Office of Legal Services of the Office of Economic Opportunity is engaged in advocacy of the interests of the poor before administrative agencies and courts.

The Administrative Conference has supported proposed legislation to establish a "People's Counsel Corporation" (see S. 3439, 91st Cong., reintroduced with amendments, S. 1423, 92d Cong.), and to establish a Consumer Protection Agency to advocate the interests of consumers in Federal administrative proceedings (see H.R. 10835, 92d Cong., passed by the House in 1971, and S. 1177, 92d Cong.). Legislation to provide for the establishment and funding of an independent Legal Services Corporation, which would be authorized to provide representation to indigent persons in administrative proceedings, has also been receiving a great deal of Congressional attention (see H.R. 8163; S. 2007, enacted by the Congress but vetoed by the President in 1971; S. 3010; S. 3193; and H.R. 12350).

Although the specific form of the Conference's recommendation—the creation of a "Poor People's Counsel"—has not received wide support, the work of the Conference has had the effect of broadening the participation of the poor in Federal administrative proceedings. The voluntary action taken by many Federal agencies and the likelihood of further legislation on this subject give promise that the views of the poor and of consumers will be presented in agency proceedings, with resulting improvements in the decisionmaking process.

Recommendation 6: Delegation of final decisional authority subject to discretionary review by the agency (adopted December 10, 1968)

In some agencies with a substantial number of formal hearings, agency heads devote a significant portion of their time to the review of routine cases which have little if any policy implications. This practice diverts the energies of agency heads from more important tasks and harms public and private interests by delaying the decision of cases. The Administrative Conference, after studying the experience of a few agencies with intermediate review boards or with certiorari-type review of hearing examiner decisions, concluded that other agencies should consider the adoption of these techniques.

The recommendation calls upon agencies which have a substantial number of on-the-record proceedings to establish either an intermediate review board to hear appeals from hearing examiner decisions, or, alternatively, to provide that examiner decisions shall be final, subject to discretionary review by the agency heads. The recommendation supported the existing practices of the FCC, ICC and Patent Office, which had established intermediate review boards, and of the CAB, which had developed a certiorari procedure for the review of examiner decisions. The recommendation has been followed by the AEC, which has established an intermediate review board. The NLRB, with the support of the Conference, has sought to persuade Congress to enact legislation which would accord greater finality to the decisions of its hearing examiners (see § 1 of H.R. 7152, 92d Cong., 1st Sess.).

Agencies which have delegated greater decisional authority to subordinate boards and to hearing examiners have reported that the procedure results in more expeditious decisions of higher quality. Enhancing the status of hearing examiner decisions improves the morale of examiners and the quality of their work. The practice also relieves agency heads of the burden of deciding routine cases, allowing them to devote their attention to major regulatory policies and programs.

Recommendation 7: Elimination of jurisdictional amount requirement in judicial review (adopted December 10, 1968)

Statutory provisions for judicial review of Federal agency actions at the instance of persons aggrieved do not require that any specific amount of money be involved in the controversy. But in the case of so-called "non-statutory" review of agency action, the person aggrieved must sometmes rely on a statutory provision, 5 U.S.C. § 1331(a), granting Federal courts jurisdiction to hear cases involving Federal questions, and in such cases the plaintiff must satisfy the statutory requirement that the amount in controversy exceed $10,000. Since

there are some rights, such as citizenship or entitlement to a draft deferment, which are not easily stated in monetary terms, the jurisdictional-amount requirement serves in this limited category of cases as an undesirable restriction on the availability of judicial review.

The recommendation calls for the elimination of the jurisdictional-amount requirement in actions in United States district courts in which the plaintiff seeks judicial review of the legality of Federal administrative action. It is part of a series of three recommendations (Nos. 7, 9, and 18), all of which are designed to streamline and improve judicial review of administrative action by removing technical barriers that serve no useful purpose.

Legislation to implement the recommendation was introduced in the 91st Congress (S. 3568) and hearings were held in May 1971. The bill has been reintroduced in the 92d Congress (S. 598) and is under consideration by the Senate Committee on the Judiciary. Enactment of this legislation would improve judicial review by eliminating an unnecessary and unwarranted technicality.

Recommendation 8: Judicial review of Interstate Commerce Commission orders (adopted December 10, 1968)

Unlike the orders of other independent regulatory agencies, orders of the Interstate Commerce Commission are reviewed by specially constituted three-judge United States district courts, with a right of direct appeal to the Supreme Court of the United States. This departure from the norm is undesirable for for several reasons: the burden and delay involved in the creation of a special three-judge court in each case; the enlarged possibilities of forum-shopping available to litigants; and the extra workload created for the Supreme Court by the statutory right of appeal.

The recommendation calls for the elimination of judicial review of ICC orders by specially constituted three-judge district courts, and the substitution of the procedure aplicable to other independent regulatory agencies—a petition for review in a United States Court of Appeals with review of its decision by the Supreme Court only by writ of certiorari.

Legislation to implement this recommendation (S. 3597, 91st Cong.) has received substantial support. But the inability of the Department of Justice and the Interstate Commerce Commission to agree on the details of the legislation has thus far blocked its enactment. The Senate Judiciary's Subcommittee on Improvement in Judicial Machinery is now considering this subject along with other issues relating to three-judge district courts.

The existing procedure for judicial review of ICC orders places an unwaranted and unnecessary burden on the Federal courts. Substitution of the review procedures presently applicable to the other independent regulatory agencies would provide savings of time and expense.

Recommendation 9: Statutory reform of the sovereign immunity doctrine (adopted October 21, 1969)

The doctrine of sovereign immunity, which prevents suits against the United States except as Congress has consented to suit by statute, has never stood in the way of judicial examination of the constitutionality and lawfulness of the official actions of Federal officers. A variety of statutory review provisions authorize judicial review of many Federal administrative actions; and most of the remainder have been subject to judicial review in injunction and mandamus actions against the individual officer. A highly technical, confused and erratic body of law, however, sometimes prevents a Federal court from passing on the legality of Federal administrative action. The purpose of this recommendation is to remedy this injustice.

The recommendation calls for legislation to eliminate the defense of sovereign immunity in actions in Federal courts in which it is claimed that a Federal agency or officer engaged in unlawful conduct. The recommendation would not affect the monetary liability of the United States, but deals only with specific relief.

Hearings on legislation to implement the recommendation were held in May 1971 (S. 3568, 91st Cong.), at which opposition was expressed by the Department of Justice, based on fears, in our view, exaggerated, that the legislation would produce a substantial amount of new litigation. The bill has been reintroduced in the 92d Congress and is under consideration by the Senate Committee on the Judiciary (S. 598).

The archaic, confused and erratic application of the sovereign immunity doctrine to bar judicial review of administrative action results in injustice to private citizens and creates a highly technical issue, unrelated to the merits, for judicial determination. Officials of the United States, if their actions are otherwise subject to judicial review, should not avoid judicial scrutiny of the legality of their actions by asserting this technical defense.

Recommendation 10: Judicial enforcement of orders of the National Labor Relations Board (adopted October 21, 1969)

The orders of the National Labor Relations Board, unlike those of all other Federal administrative agencies, are not self-enforcing. The Board must institute a judicial proceeding to obtain enforcement, and until enforcement is obtained no sanctions attach to violation. The effect of this anachronism is to encourage employers or unions against whom Board orders are directed to postpone compliance with a Board order solely for purposes of delay. Requiring the Board to seek judicial review of orders which are not contested on the merits also imposes an unnecessary workload both on the Board's staff and on the already overburdened courts of appeals.

The recommendation would make orders of the NLRB, like those of other Federal administrative agencies, automatically enforceable unless the person against whom the order is directed seeks to challenge the order in court. Legislation to implement the recommendation (H.R. 7152, 92d Cong., 1st Sess.) has been introduced and hearings have been held. While the legislation has received wide support, it is opposed by management interests and has not been reported out of committee.

Providing that NLRB orders take effect automatically unless challenged in court would result in the elimination of delay in the enforcement of Board orders and in savings of time and money to both the Board and the Federal courts.

Recommendation 11: Publication of a "Guide to Federal Reporting Requirements" (adopted October 21, 1969)

There is no readily available compendium of the thousands of reporting requirements that are contained in Federal statutes and regulations. This recommendation urges the General Services Administration to publish a "Guide to Federal Reporting Requirements," similar in nature to the "Guide to Record Retention Requirements" which it now publishes. There is need for a complete and accessible compilation of these requirements.

The General Services Administration has reported that work on this project has been deferred by reason of other priorities and lack of necessary manpower and funds. It is hoped that these obstacles will be overcome. Government efficiency would be improved by a greater working knowledge of Federal reporting requirements. The elimination of unnecessary, excessive or duplicative filing requirements on private businesses and persons might result from such a compilation.

Recommendation 12: Analytical subject indexes to selected volumes of the Code of Federal Regulations (adopted October 21, 1969)

The utility of the Code of Federal Regulations is impaired by the absence or inadequacy of subject-matter indexes which assist the reader in finding, the pertinent regulation for which he is searching. Since many regulations have the force of law and persons subject to them may be subject to sanctions for noncompliance, the adequacy of indexes to these regulations is not an unimportant matter.

The recommendation calls upon each Federal agency, with the assistance of the Office of the Federal Register, to supply and improve the subject-matter indexes to the titles of C.F.R. which contain its regulations. The Office of the Federal Register reports that a number of agencies have improved their indexes, and that it is giving attention to more general methods of improving the indexing system. If this is done, the Code of Federal Regulations will better serve its basic purpose of informing members of the public of the requirements of law which they are required to observe.

Recommendation 13: Elimination of duplicative hearings in FAA safety decertification cases (adopted October 29, 1969)

Prior to May 1, 1970, an aircraft pilot licensed by the Federal Aviation Administration was entitled to two evidentiary hearings before suspension or revocation of his pilot's certificate: a full hearing was held by the Federal Aviation Administration and then the pilot was also entitled to a trial de novo before the National Transportation Safety Board. The recommendation urged the elimination of the hearing before the FAA on the grounds that it was duplicative and unnecessary.

The recommendation was fully implemented when the Federal Aviation Administration adopted a regulation terminating, effective May 1, 1970, its procedures for a formal hearing (see 35 Fed. Reg. 5465). Pilot de-certification hearings are now held only before the National Transportation Safety Board, although they are preceded by an FAA investigation and conference which provides information to the pilot and an opportunity for settlement.

The recommendation has resulted in the elimination of a wasteful and unnecessary hearing without any sacrifice of procedural safeguards to affected pilots. The FAA reports that the new procedures are working well and that there has been a reduction in the time and cost of processing enforcement actions, with resulting savings to both the pilot and the agency. The National Transportation Safety Board reports that the elimination of the FAA formal hearing has served to expedite proceedings; has resulted in no prejudice to the rights and interests of the airmen involved; and, although it has increased the workload of its examiners to some extent, the result is regarded as clearly in the public interest.

Recommendation 14: Compilation of statistics on administrative proceedings by Federal departments and agencies (adopted October 21, 1969)

The Administrative Conference undertook in 1968 to continue the previous efforts of the temporary Conference of 1961–62 and of the Senate Judiciary Committee's Subcommittee on Administrative Practice and Procedure. This effort involved the compilation of elaborate statistics on administrative proceedings for the fiscal years 1961–1966. The utility of the information collected was limited because of incompleteness, variations in reporting, and the inability of the Conference, with its limited resources, to analyze and evaluate the resulting data. On the basis of this experience, a determination was made that the endeavor was not worth the effort that it entailed. It was believed that improvement of the statistics compiled and published by individual agencies would prove of greater benefit.

The recommendation calls on each agency to compile and publish statistics adapted to its own needs but in conformance with certain minimum standards. In particular, each agency was requested to compile data indicating the number of proceedings of various types which it conducted and the time and manner of their disposition.

Agency responses indicate general approval of the recommendation and an intention to comply. A number of agencies now are compiling and publishing more detailed statistics concerning their administrative proceedings. Recent reports received from some 34 Federal agencies, however, indicate the need for a much more elaborate effort in order to provide meaningful information about administrative caseloads and delays. This is especially true if any attempt is to be made to use statistical data as a basis for comparative evaluation of administrative delay and performance.

Recommendation 15: Consideration of alternatives in licensing procedures (adopted October 21, 1969)

Social and technological changes in an increasingly complex world have created a new awareness of the interrelationship of many phenomena that were previously considered separately. The preoccupation of some administrative agencies with a specific program mission and with their own past policies has sometimes resulted in a failure to place a developing problem in its broader social perspective. *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 354 F. 2d 698 (2d Cir. 1965), which requires an agency to explore and consider possible alternatives to the specific plan proposed by an applicant, served as a useful reminder that an agency should not view its problems in a narrow perspective.

The recommendation provides that agencies exercising licensing functions should seek to create procedures fitting the particular circumstances which will assure appropriate consideration of alternatives where necessary, and at the same time will permit effective administration of the licensing functions. It was designed as a guideline to stimulate agency thought and foresight as a consequence of the *Scenic Hudson* case.

The question of the extent of an agency's obligation to consider alternatives, including those beyond its authority to act upon, has become more critical since the enactment of the National Environmental Policy Act of 1969, which became effective in 1970. Court decisions interpreting and applying the evironmental-impact-statement procedure of that Act have raised a number of important questions which are now under consideration by the Conference. There is need to strike a proper balance between adequate consideration of environmental issues in licensing proceedings and the necessity for relatively prompt dispositions in such proceedings.

Recommendation 16: Elimination of certain exemptions from the APA rulemaking requirements (adopted October 21, 1969)

Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553, exempts from its notice-and-comment rulemaking provisions rules "relating to . . . public property, loans, grants, benefits, or contracts." Whatever the original justification for these exemptions, it is now apparent that the general public has a vital interest in the promulgation and content of general regulations governing such matters as the use and disposition of public land, the terms on which individuals contract with the Federal Government, and their eligibility for grants and benefits.

The recommendation calls for legislation to amend the Administrative Procedure Act to delete these exemptions and, in the meantime, for agencies to comply voluntarily with APA rulemaking procedures in otherwise exempt proceedings.

The recommendation has been largely implemented by voluntary agency action with respect to regulations dealing with public property, loans, grants, and benefits. About 20 departments or agencies have published rules or policy statements which commit the agent to the use of notice-and-comment rulemaking procedures in these areas. Several agencies, however, including the Department of Defense, have been unwilling to adopt APA rulemaking procedures with respect to rulemaking involving Government contracts. Legislation which would implement the recommendation in its entirety has been introduced in the Congress (S. 1414, 92d Cong., 1st Sess.), but has not been enacted.

The general principle is clear—rulemaking which is of vital interest to a large number of people should be accompanied by the notice-and-comment procedures of 5 U.S.C. § 553, unless, in accordance with that section, the agency finds that "notice and public procedure are impracticable, unnecessary, or contrary to the public interest." The opportunity for the public to participate in rulemaking actions is likely to improve the quality of the rules as well as to increase their public acceptability.

Recommendation 17: Recruitment and selection of hearing examiners; continuing training for Government attorneys and hearing examiners; creation of a center for continuing legal education in Government (adopted October 22, 1969)

The performance of the Federal administrative process is largely influenced by the calibre and training of the lawyers who participate in this process. This recommendation is designed to improve the quality of the legal services provided to the Federal Government by dealing with three related subjects: (1) recruitment and selection of hearing examiners; (2) continuing legal training for Government attorneys and hearing examiners; and (3) the establishment of a center for continuing legal education in the Federal Government.

With respect to the selection of hearing examiners, the Conference recommendation called for enlarging the base of recruitment by recognizing trial experience as one basis for qualification, experimental departure from the policy of selective certification of examiners in favor of a general register of eligibles, and experimental intern program to supplement direct appointment of examiners, and relaxation of the requirements of the Veterans Preference Act in the selection of examiners. The U.S. Civil Service Commission has adopted the first of these proposals. No plans are presently under way, however, to implement the remainder.

The Conference has worked with the Civil Service Commission to strengthen the Federal programs concerned with continuing training of lawyers and hearing examiners. The Commission has expanded and improved its programs in this area. Legislation to establish a "Federal Administrative Justice Center" to conduct programs of continuing education was introduced and hearings held in May 1970 (S. 3686, 91st Cong., 2d Sess.), and the legislation has been reintroduced in the 92d Congress (S. 597). The Civil Service Commission opposes the establishment of a separate agency to perform these functions. Whether or not this function is placed in a new agency, continuing efforts are required to ensure that the Federal Government attracts and retains lawyers of the very highest ability.

Recommendation 18: Parties defendant (adopted June 2, 1970)

Many Federal agencies cannot be sued in their own name and a person who seeks to obtain judicial review of their actions must take care to name the proper official as a party defendant. Technical defects of this kind have occasionally precluded judicial review of an otherwise meritorious case. The recommendation is designed to clarify and simplify the law of parties defendant to preclude dismissal of just cases on this ground.

The recommendation has been combined in a legislative proposal with recommendations 7 and 9, dealing respectively with the jurisdictional amount requirement and sovereign immunity as a barrier to judicial review of administrative action. Hearings have been held on the legislation (S. 3568, 91st Cong.) and the bill, reintroduced in the 92d Congress (S. 598), is under consideration by the Senate Committee on the Judiciary. There is general acceptance of the provisions of this legislation which deal with jurisdictional amount (Recommendation 7) and parties defendant (Recommendation 18); only the aspects relating to sovereign immunity (Recommendation 9) are opposed by the Department of Justice.

Recommendation 19: SEC no-action letters under section 4 of the Securities Act of 1933 (adopted June 2, 1970)

There is a tendency on the part of some administrative agencies to maintain flexibility and centralized discretion by refraining from publishing rules, standards and even decisions. At the extreme, a regime of "secret law" may result in inconsistent decisions, failure to articulate standards, and inability of affected persons or the public to know and evaluate the policy choices that an agency has made. The Committee on Informal Action of the Administrative Conference has undertaken a series of studies of the exercise of discretion by particular agencies; and this was the first formal recommendation to result from this effort.

The recommendation called upon the Securities and Exchange Commission to promulgate rules setting forth the legal interpretations, policies and standards which guide its discretion in determining registration obligations in the issuance of "no-action letters"; to summarize and make public its more important "no-action" rulings; to discontinue the issuance of such letters in routine situations; and to publicize the significant aspects of all future "no-action" letters, subject to deletion of confidential information.

In December 1970, in partial response to the recommendation, the SEC adopted procedural rules under which most "no-action letters" and other interpretative rulings became publicly available (35 Fed. Reg. 11779). Subsequently, the SEC promulgated standards which eliminate the need for letter rulings in a large number of situations (Rule 144, effective April 15, 1972, SEC Release No. 52231).

The publication of individual rulings and the adoption of rules of general applicability inform the public of the requirements that the agency plans to impose on private conduct. The availability of this information also eliminates many individualized requests for interpretive advice which would otherwise need to be handled. This recommendation of the Conference has made more information available to the public while reducing substantially the number of requests for advice which the SEC staff must handle.

Recommendation 20: Summary decision in agency adjudication (adopted June 2, 1970)

Trial procedures, which are time-consuming and expansive, are appropriate only for contested issues of fact. Adjudicatory proceedings which turn on questions of law or policy are appropriately decided on the basis of briefs or oral argument or both.

This recommendation adapts for the use of administrative agencies the successful "summary judgment" techniques of Federal courts and of some agencies. The recommendation urges agencies to avoid unnecessary evidentiary hearings where no genuine issue of material fact exists by adopting suggested procedures for summary decision.

A number of Federal agencies were employing summary decision procedures with success prior to the adoption of this recommendation. Others have subsequently adopted procedural rules implementing the regulation. For example, the Federal Communications Commission (37 Fed. Reg. 7504) and the Occupational Safety and Health Review Commission (49 C.F.R. 1100.45) have recently done so.

Unnecessary time and expense can be eliminated through the adoption of modern procedural devices which expedite the handling of proceedings without sacrificing the citizen's right to a full hearing on contested issues of fact.

Recommendation 21: Discovery in agency adjudication (adopted June 2, 1970)

The provision of information to the participants in an adjudicatory proceeding has an important baring on the quality and length of a tral. The availability of broad discovery under the Federal Rules of Civil Procedure, while it may sometimes be productive of delay or expense, is generally viewed as an important factor in expediting trials and producing relevant facts on which a just result may be reached. Discovery may operate as a similarly valuable tool in administrative adjudication, despite the greater variety of administrative functions which involve formal hearings.

The recommendation calls upon each agency that conducts evidentiary hearings subject to the Administrative Procedure Act to adopt minimum discovery procedures, including provisions with respect to: prehearing conferences, exchange of witness lists and evidentiary exhibits, depositions, written interrogatories, requests for admissions, production of documents, protective orders and subpoenas.

A number of agencies have implemented the recommendation in whole or in part. For example, the Atomic Energy Commission, Federal Maritime Commission, Occupational Safety and Health Review Commission, and the Postal Rate Commission have adopted or revised procedural rules in accordance with the recommendation.

The liberal rules of discovery in civil litigation in United States district courts have demonstrated that discovery is a valuable tool for getting at the truth. While there are some special problems in adapting liberal discovery to the entire universe of administrative adjudication, major benefits will accrue in terms of shortened records and more sharply focused hearings if detailed information is provided in advance of trial.

Recommendation 22: Practice and procedures under the Renegotiation Act of 1951 *(adopted June 2, 1970)*

The Federal Government is now the purchaser of a substantial portion of the goods and services produced by the economy. The fairness and appropriateness of the procedures applied to those who deal with the Federal Government is therefore a matter of great importance. This recommendation deals with the practices and procedures which have arisen under the Renegotiation Act of 1951.

The recommendation calls upon the Renegotiation Board to publicize its criteria for making excess-profit determinations, to provide contractors with reasoned decisions, and to make the performance reports of procurement agencies available to contractors. An accompanying resolution suggests that the Tax Court revise the rules governing the burden of proof in judicial review of renegotiation determinations.

The Renegotiation Board substantially complied with the recommendation in early 1971 (see 36 Fed. Reg. 3807). Its new rules provide for the availability of performance reports, agreements and orders determining excess profits, statements of facts and reasons, and letters not to renegotiate.

Jurisdiction of judicial review of renegotiation cases was transferred to the U.S. Court of Claims by statute in 1971. In *Lykes Bros. Steamship Co., Inc.* v. *United States* (Ct. Cl., No. 594–71, May 12, 1972), the Court of Claims held that the Government had the burden of proving, by a preponderance of the evidence, that the plaintiff realized excessive profits. The decision fully implements the Conference resolution.

The renegotiation process has important effects on the thousands of businessmen who provide services or materials to the Federal Government. A more open procedure will have important benefits in eliminating uncertainty and informing the public.

Recommendation 23: Interlocutory appeal procedures (adopted May 7, 1971)

An immediate appeal to agency heads from a procedural or other ruling of a presiding officer tends to disrupt and delay the proceeding. On the other hand, an occasional interlocutory appeal may shortcut a lengthy hearing by providing an early determination of a central question of law or policy. Interlocutory appeal procedures for agency review of rulings by presiding officers must balance the advantages derived from prompt correction of an erroneous ruling against interruption of the hearing process and other costs of piecemeal review. In general, interlocutory appeals should be permitted only in exceptional situations.

The recommendation urges agencies which have a substantial volume of adjudicatory proceedings to adopt procedures which permit interlocutory appeals only in very limited circumstances. Except in extraordinary circumstances, the allowance of an interlocutory appeal should not operate to stay the proceeding.

Agency responses indicate that agencies which have a substantial number of formal adjudications have adopted procedures, in accordance with the recommendation, which restrict interlocutory appeals. The Federal Communications Commission, for example, recently has adopted such a rule.

Reduction in the number of interlocutory appeals will expedite administrative trials and improve the process by vesting more authority in Federal hearing examiners, who are in the best position to control the proceeding.

Recommendation 24: Principles and guidelines for implementation of the Freedom of Information Act (adopted May 7, 1971)

The Freedom of Information Act of 1966, 5 U.S.C. § 552, was a major step in assuring that disclosure rather than secrecy would govern the activities of the Federal Government. This recommendation, which is in three parts, is designed to implement the Act by the establishment of procedures which will make information subject to disclosure under the Act more readily available to the public.

The first part of the recommendation sets forth general principles which call on agencies to adopt liberal policies in making information available to the public under the Freedom of Information Act. The second part sets forth detailed guidelines as a model of the kinds of procedures that would implement these general principles. Finally, the recommendation proposes the establishment of an interagency committee to establish Government-wide criteria for fees charged for provision of information.

Nearly all major Federal agencies have indicated substantial compliance with the general principles contained in the recommendation. A number of agencies, including the Civil Aeronautics Board, the General Services Administration, and the U.S. Information Agency, have adopted regulations complying fully with the model procedures. Many other agencies have the guideline procedures under active study. The Conference has also worked closely with the Subcommittee on Foreign Operations and Government Information of the House Committee on Government Operations, which has been holding extensive hearings on agency compliance with the Freedom of Information Act.

The public interest has been advanced by the more ready availability to the public of information about the Federal Government and its activities. The work of the Administrative Conference in this area has contributed to a greater compliance on the part of Federal agencies with the letter and spirit of the Freedom of Information Act.

Recommendation 25: Articulation of agency policies (adopted May 7, 1971)

A major criticism of Federal administrative agencies in recent years has been their failure to articulate and publish the standards and policies employed in the effectuation of their statutory responsibilities. This recommendations, recognizing the desirability of agencies making their policies public to the greatest extent practicable, calls upon each agency which takes actions affecting substantial public or private rights to state the standards that guide its determinations and to make them readily available to the public.

While the recommendation is hortatory in nature, many agencies have indicated that they are taking steps to state the standards that govern their actions through the publication of manuals, rules, decisions, etc. Several agencies have submitted specific illustrations of instances in which policies have been articulated. The recommendation, along with other activities of the Conference that have increased public awareness of agency policies, may result in greater citizen confidence in the integrity of agency actions.

Recommendation 26: Minimum procedures for agencies administering discretionary grant programs (adopted May 7, 1971)

Federal agencies that administer grant programs have employed disparate and sometimes inadequate procedures to notify applicants of available programs and funds, the policies for awarding grants, and the actions taken on the applications. The increasing importance of grant programs to public institutions and private groups makes the procedures by which these programs are administered a matter of great public concern.

The recommendation calls upon agencies which administer discretionary grant programs to adopt minimum procedures which include: public notice of the availability of funds; development of criteria for selection between competing applicants; and notification to applicants of the actions taken upon their applications and requests.

While the recommendation is hortatory in character, the major agencies that administer grant programs, including the Departments of Agriculture, Defense, HEW and HUD, have reported that they have or will adopt procedures which implement the recommendation. The Department of Transportation, Atomic Energy Commission, Small Business Administration and the Veterans' Administration state that they are now in full compliance. Implementation of this recommendation will improve the fairness of Federal grant programs by providing better information concerning grant programs and policies and by allowing all applicants to compete on more equal terms for grant funds.

Recommendation 27: Procedures of the Immigration and Naturalization Service in respect to change-of-status applications (adopted December 6, 1971)

Decisions to change the status of aliens made by the Immigration and Naturalization Service are of enormous importance to thousands of aliens affected by these actions. An extensive study of this discretionary function, conducted with the full cooperation of the Service, produced suggestions for improving the procedural aspects of the program, a number of which have already been implemented by the Service. It also disclosed that lack of guidance as to decisional norms often results in inconsistent decisions.

The recommendation calls upon the Immigration and Naturalization Service to establish rules and standards to guide decision of change-of-status cases, and to publish these standards as well as the opinion in significant cases. Public availability of administrative manuals and handbooks and of precedential decisions is also urged.

The recommendation was formally transmitted to the Attorney General and the Commissioner of the Immigration and Naturalization Service in December 1971 with a request for a status report in June 1972. Adoption of the recommendation by the Service would result in fairer procedures and more consistent decisions in this important administrative program.

Recommendation 28: Public participation in administrative hearings (adopted December 6, 1971)

Private individuals and citizen organizations, often representing those without a direct economic or personal stake in the outcome, are increasingly seeking to participate in administrative proceedings in order to protect interests and to present views not otherwise adequately represented. Agency decisionmaking benefits from the additional perspective provided by informed public participation, provided the agency maintains control of the proceeding and does not permit undue delay. This recommendation is designed to make public participation in Federal administrative hearings meaningful and effective without impairing the agency's performance of its statutory obligations.

The recommendation encourages agencies to allow persons whose interests or views are relevant and not otherwise represented to participate in administrative

proceedings. The recommendation treats in detail with selection of intervenors, scope of participation to be allowed, reasonable limits on participation, and methods of informing the public about proceedings in which participation may be desired. Agencies are also urged to adopt procedures to minimize the costs of public participation.

The recommendation has been brought to the attention of all affected Federal agencies and is currently under study. It has received favorable attention in court decisions and Congressional hearings and from public interest law groups. Its adoption by all agencies would improve the quality of administrative decision-making by providing deciders with more and better information. Greater citizen acceptance of governmental decisions would also result if citizens were given an opportunity to participate in the making of those decisions.

Recommendation 29: Rulemaking on a record by the Food and Drug Administration (adopted December 6, 1971)

The Federal Food and Drug and Cosmetic Act requires the Food and Drug Administration (FDA) to hold a formal evidentiary hearing in connection with promulgation of certain types of rules of general applicability. While there is a widespread belief that these trial-type procedures are ill-adapted to the adoption of rules of general applicability, the failure of the FDA to follow procedures utilized by other administrative agencies to facilitate the handling of complex, multi-party proceedings has aggravated the problem.

The recommendation urges FDA in its formal rule-making to make more effective use of procedural devices, such as prehearing conferences, discovery, and use of written testimony, that have been found effective in expediting the trial of protracted proceedings. Additional procedural safeguards, such as internal separation of functions and the prohibition of certain *ex parte* communications, are also recommended.

The recommendation was transmitted to the Secretary of Health, Education and Welfare and the Commissioner of Food and Drugs shortly after its adoption, and they have concurred in the recommendation. The FDA has already implemented in full the portions of the recommendation dealing with separation of functions and *ex parte* communications, and has agreed to implement the remaining provisions over the next few months.

Implementation of the recommendation will improve the handling of these formal proceedings within their present statutory framework. A recommendation scheduled for consideration by the Administrative Conference in June 1972 carries this subject a step further by urging the FDA and other agencies to utilize less cumbersome procedures in the adoption of rules of general applicability which are now formulated after lengthy trial-type procedures.

Recommendation 30: Modification and dissolution of orders and injunctions (adopted December 6, 1971)

Cease-and-desist orders issued by administrative agencies and injunctions obtained by agencies from the Federal courts in the enforcement of regulatory statutes have generally been permanent in duration. As a result of this practice, many orders and injunctions now outstanding that are decades old may serve no useful purpose and may cause unwarranted inconvenience and hardship to the persons against whom they are directed.

The recommendation deals with this problem by urging each agency that issues a significant number of cease-and-desist orders to adopt a procedure whereby a person may request modification or vacation of a decree or order upon a showing that relief would be appropriate. The agency should also join in seeking court modification of such decrees and orders where appropriate.

The recommendation is now under study by the agencies to which it applies. Adoption of the recommendation will ease occasional hardships resulting from the application of old and outmoded orders to private persons.

Recommendation 31: Enforcement of standards in Federal grant-in-aid programs (adopted December 7, 1971)

Federal agencies annually disburse billions of dollars in grants-in-aid to state and local governments and to private entities to subsidize activities in such areas as welfare, housing, transportation, urban development and renewal, law enforcement, education, pollution control and health. While direct recipients of the

grants are public and private bodies, the intended ultimate beneficiaries of the grant programs are private persons. The administration of these programs has suffered from the lack of a complaint procedure with respect to non-compliance with Federal standards and from the absence of any sanctions for non-compliance other than the extreme measure of a total cut-off of funds.

This recommendation, which has application only to agencies having substantial grant programs, proposes the establishment of publicized complaint-handling procedures to bring to light deficiences in the programs and the development of sanctions to assure compliance with Federal standards by grantees. Use of a range of sanctions to enforce Federal standards, including the imposition of special conditions or remedial steps, public disclosure of non-compliance, and the partial disallowance of funds, are encouraged.

The recommendation has been brought to the attention of applicable Federal agencies and is currently under active study. The largest Federal grant-making agency, the Department of Health, Education, and Welfare, is undertaking a careful review of the recommendation.

Recommendation [32–35,] adopted June 8–9, 1972.—Four recommendations were adopted at the Seventh Plenary Session of the Administrative Conference, held June 8–9, 1972. These recommendations are being sent to the agencies affected with a request that they provide a report on the status of implementation before the next Assembly meeting in December. A brief statement of the objectives of the recommendations follows:

Recommendation 32: Broadcast of agency proceedings.—The recommendation calls upon agencies to establish policies with respect to broadcast of agency proceedings and encourages broadcast coverage or proceedings involving issues of broad public interest, subject to appropriate limitations and controls to prevent disruption and protect witnesses. A dissenting statement of some members of the Council takes issue with the assumptions on which the recommendation is based.

Recommendation 33: Conflict-of-interest problems in dealing with natural resources of Indian tribes.—Legal disputes involving land and water rights of American Indians have resulted in serious conflict-of-interest problems for agencies charged with the dual responsibility of carrying out public programs and acting as trustee for Indian interests. The recommendation urges the enactment of legislation that would alleviate this conflict-of-interest by providing Indians with independent legal counsel to protect their claims to natural resources. Prior to the enactment of such legislation, the Departments of Justice and the Interior are urged to take administrative steps to ameliorate existing conflict-of-interest problems.

Recommendation 34: Procedures of the U.S. Board of Parole.—Determinations of the U.S. Board of Parole involving the grant, deferral or revocation of parole are of great importance to Federal prisoners and control more than two-thirds of the time served under Federal prison sentences. The recommendation, based on an extensive study of the Parole Board, proposes a number of changes in existing procedures designed to produce greater fairness and consistency in Board decisions and greater confidence on the part of prisoners in the justice of the parole process. These changes include the right to representation, access to information in the file, and statement of reasons for Board decisions.

Recommendation 35: Suspension and negotiation of rate proposals by Federal regulatory agencies.—This recommendation is concerned with the procedures by which the Civil Aeronautics Board, the Federal Communications Commission, the Federal Power Commission, and the Interstate Commerce Commission suspend and investigate newly filed rate proposals. The recommendation, in addition to calling for improved procedures in connection with rate suspensions, deals with the manner in which rate proposals are disposed of by means of negotiation or settlement.

Appendix C—Administrative Conference Budget Allocation by Object Classification

[In thousands of dollars]

Identification code		Fiscal year 1972 estimate	Fiscal year 1973 estimate	Fiscal year 1974 estimate
	Personnel compensation:			
11.1	Permanent positions	234	241	300
11.3	Positions other than permanent	30	35	50
11.5	Other personnel compensation			
11.8	Special personal services payments	(30)	(35)	(50)
	Total personnel compensation			
	Personnel benefits:			
12.1	Civilian	19	19	24
13.0	Benefits for former personnel			
21.0	Travel and transportation of persons	(15) 29	(15) 30	(20) 40
22.0	Transportation of things			
23.0	Rent, communications, and utilities	20	22	28
24.0	Printing and reproduction	5	15	25
25.0	Other services	(45) 62	(60) 77	(100) 120
26.0	Supplies and materials	8	9	10
31.0	Equipment	1	2	3
32.0	Lands and structures			
33.0	Investments and loans			
41.0	Grants, subsidies, and contributions			
42.0	Insurance claims and indemnities			
43.0	Interest and dividends			
44.0	Refunds			
	Direct research	(90)	(110)	(170)
99.0	Total obligations	408	450	60